

**Cornell Law School Library**

Cornell University Library  
**KF 4886.A4B85**

**A collection of leading cases on the law**

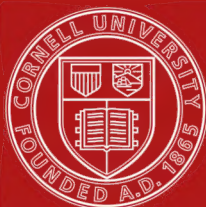


**3 1924 019 949 860**

law







## Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.



J. ALFRED KAY.

[Sept. 1871.]

ANGUS CAMERON.

## LAW PUBLICATIONS

OF

KAY &amp; BROTHER,

LAW PUBLISHERS, BOOKSELLERS &amp; IMPORTERS,

17 and 19 South Sixth Street, Philadelphia.

---

Acts of Assembly of Pennsylvania, 1801-1871. 71 volumes 8vo.	\$250.00
Alden's Condensed Reports, Supreme Court of Pennsylvania—Dallas to Binney, inclusive. 3 vols. 8vo.	15.00
Allen's Reports, Supreme Court of Massachusetts. Vols. 9 to 14 inclusive. 6 vols.	per vol. 5.50
Baldwin's C. C. Reports, Eastern District of Pennsylvania and New Jersey. 8vo.	7.50
Baldwin's Constitutional Views. 8vo.	1.75
Ball & Beatty's Chancery Reports. Two vols. in one, 8vo.	5.50
Belt's Supplement to Vesey, Sen.'s, Chancery Reports. 8vo.	4.50
Bigelow's Life and Accident Insurance Reports. Vol. I. 8vo.	7.50
Binns on Aldermen and Justices of the Peace in Pennsylvania. 8th Edition. 8vo.	6.00
Bishop's Commentaries on the Law of Married Women. Vol. I. 8vo. (Vol. II. in press.)	7.50
Bisset on Partnership; with American Notes. 8vo.	2.50
Blackburn on the Contract of Sale. 8vo.	1.25
Brewster's Reports, principally in the Courts of Philadelphia. Volumes II. and III.	per vol. 6.00
Brightly's Analytical Digest of the Laws of the United States. 2 vols. 8vo.	16.50
*.* Either volume for sale separately; the first at \$9.00, the second at \$7.50.	
Brightly's Digest of Federal Decisions. 2 vols. 8vo.	13.50
*.* Either volume for sale separately; the first at \$10.00, the second at \$3.50.	
Brightly's Bankrupt Law of the United States. 2d Edition. 8vo.	3.00
Brightly's Treatise on Equity in Pennsylvania. 8vo. <i>Out of print.</i>	
Brightly's Reports, Supreme Court of Pennsylvania. 8vo.	6.50
Brightly on the Law of Costs in Pennsylvania. 8vo.	2.50
Brightly's Leading Cases on the Law of Elections in the United States. 8vo.	7.50
Brown's Forum; or, Forty Years at the Philadelphia Bar. 2 vols. 8vo.	8.00

Browne's Reports, Supreme Court of Massachusetts. 6 vols. (97-102 Mass.) 8vo. . . . .	per vol. \$5.50
Campbell. <i>See</i> Taney's Decisions.	
Casey's Pennsylvania State Reports. 12 vols. 8vo. . . . .	54.00
Coke upon Littleton. By Hargrave and Butler. 2 vols. 8vo. . . . .	15.00
Cord on the Rights of Married Women. 8vo. . . . .	7.50
Coventry & Hughes's Digested Index to the English Common Law Reports. 2 vols. 8vo. . . . .	10.00
Debates in the Constitutional Convention of Pennsylvania of 1837. 14 vols. 8vo. . . . .	20.00
Desaussure's South Carolina Chancery Reports. 2d Edition. Four vols. in two. 8vo. . . . .	16.00
Duane on Landlord and Tenant in Pennsylvania. 12mo. . . . .	75
Duane on Roads, Highways, Bridges and Ferries in Pennsylvania. 12mo. . . . .	75
Dunlap's Book of Forms for Practice in the Courts of Pennsylvania and of the United States. 4th Edition. 8vo. . . . .	6.00
Eden's Chancery Reports. Two vols. in one. 8vo. . . . .	5.50
Equity Draftsman. <i>See</i> Van Heythuysen.	
Equity Rules of the Supreme Court of Pennsylvania. 8vo. Paper . . . . .	50
Fearne on Remainders. 2 vols. 8vo. <i>Out of print.</i>	
Finlason's Leading Cases on Pleading. 8vo. . . . .	1.50
Forum, The. <i>See</i> Brown.	
Graydon's Forms of Conveyancing in Pennsylvania. 4th Edition. 8vo. . . . .	4.50
Greening's Forms of Declarations. 8vo. (In preparation.)	
Gresley's Equity Evidence. 8vo. <i>Out of print.</i>	
Hale's History of the Pleas of the Crown. 2 vols. 8vo. . . . .	15.00
Harris's Pennsylvania State Reports. 12 vols. 8vo. . . . .	54.00
Harrison's Analytical Digest. 2d Edition. 7 vols. 8vo. . . . .	Net 21.00
** Vols. 6 and 7 for sale separately at \$4.50 each, <i>net</i> .	
Hildyard on Marine Insurance. 8vo. . . . .	2.50
Hilliard on the Law of Injunctions. 2d Edition. 8vo. . . . .	7.50
Hilliard on the Law of New Trials. 8vo. . . . .	7.50
Hilliard on the Law of Contracts. 2 vols. 8vo. (In press.)	
Hindmarch on Patents. With American Notes. 8vo. . . . .	2.50
Hood on the Law of Executors in Pennsylvania. 2d Edition. (In press.)	
Kerr on the Law and Practice of Receivers. With American Notes by G. Tucker Bispham, Esq. 8vo. (In preparation.)	
Lester's Land Laws of the United States. 2 vols. 8vo. . . . .	12.50
** Either volume for sale separately; the first at \$7.50, the second at \$5.00.	

Linn's Index to Cases in the Courts of Pennsylvania. With an Appendix of Cases overruled, &c. 8vo. . . . .	\$6.50
Maddock's Chancery Reports. Six vols. in three. 8vo. . . . .	15.00
Marshall's Decisions. 2 vols. 8vo. <i>Out of print.</i>	
Massachusetts Reports. <i>See Allen and see Browne.</i>	
Metcalf on the Law of Contracts. 8vo. . . . .	4.50
Miles's Reports, District Court of Philadelphia. 2 vols. 8vo. <i>Out of print.</i>	
Mitchell's Pennsylvania Constable. (In preparation.)	
Morris on the Law of Replevin. 2d Edition. 8vo. . . . .	5.00
Penrose & Watts's Reports, Supreme Court of Pennsylvania. 3 vols. 8vo. . . . .	18.00
Phillips on Insurance. 5th Edition. 2 vols. 8vo. . . . .	15.00
Pomeroy's Constitutional Law. 8vo. Cloth . . . . .	4.50
"          "          "          Law sheep . . . . .	5.00
Pothier on Obligations. 3d American Edition. 2 vols. 8vo. . . . .	10.00
Price on Limitations and Liens in Pennsylvania. 8vo. . . . .	3.50
Pritchard's Admiralty Digest. 8vo. . . . .	3.50
Purdon's Digest of the Laws of Pennsylvania. 1700 to 1861. 9th Edition, by F. C. Brightly, Esq. 8vo. . . . .	8.00
Purdon's Annual Digest. 1862-71. By F. C. Brightly, Esq. 8vo. Paper . . . . .	2.00
Rand and Furness on Poisons, Legally and Medically considered. 8vo. (In preparation.)	
Rawle's Lecture on Equity in Pennsylvania. 8vo. Paper . . . . .	1.50
"          "          "          "          Law sheep . . . . .	2.00
Redfield on Carriers, Telegraphs and Innkeepers. 8vo. . . . .	6.50
Redfield on Corporations. 8vo. (In preparation.)	
Roberts's Digest of British Statutes in Force in Pennsylvania. 2d Edition. 8vo. . . . .	2.50
Roper on Legacies. 2d American Edition. 2 vols. 8vo. . . . .	15.00
Sanders on Uses and Trusts. 2d Edition. Two vols. in one. 8vo. . . . .	5.50
Saunders on Pleading and Evidence. 6th American Edition. (In preparation.)	
Sayles's Texas Practice. 8vo. . . . .	7.50
Scott's Commentaries on the Intestate Law of Pennsylvania. 8vo. (In press.)	
Selwyn's Nisi Prius. 7th American Edition. 2 vols. 8vo. . . . .	15.00
Sergeant on the Lien Law of Pennsylvania. 2d Edition. 8vo. . . . .	3.50
Sergeant on the Law of Attachment in Pennsylvania. 2d Edition. 8vo. . . . .	2.50
Sergeant on the Land Laws of Pennsylvania. 8vo. . . . .	2.50

Sergeant & Rawle's Reports, Supreme Court of Pennsylvania.	17 vols.		
8vo. . . . .		Net	\$170.00
Sharswood's Lectures on Commercial Law.	12mo. Cloth.	Net	1.25
" " " " " " " " " " " "	8vo. Law sheep.	Net	2.50
Smith on Executory Interests.	8vo. . . . .		3.50
Smith's Pennsylvania State Reports.	15 vols. 8vo. . . . .		67.50
** This is the current series of Pennsylvania State Reports.			
Smith's Forms of Procedure in the Courts of Pennsylvania.	2d Edition.		
8vo. (In preparation.)			
Smith and Reed's Laws of Pennsylvania.	1700-1829. 10 vols. 8vo.		25.00
** Vols. 8, 9 and 10 for sale separately at \$3.00 per volume.			
Snell's Principles of Equity.	8vo. . . . .		7.50
Stephen on Pleading.	9th American Edition. 8vo. . . . .		4.50
Sugden on Vendors and Purchasers.	8th American Edition. 8vo. (In preparation.)		
Taney's Circuit Court Decisions, District of Maryland.	8vo. . . . .		7.50
Thayer's Lecture—Law considered as a Progressive Science.	8vo. Paper		30
Tidd's Practice.	4th American Edition. 2 vols. 8vo. . . . .		15.00
Troubat on Limited Partnership.	8vo. . . . .		5.50
Troubat and Haly's Pennsylvania Practice.	Two vols. in three. 8vo.		22.50
Van Heythuysen's Equity Draftsman.	4th American Edition. 8vo. . . . .		7.50
Walker's Court Rules.	8vo. . . . .		2.50
Watts's Reports, Supreme Court of Pennsylvania.	2d Edition. 10 vols. 8vo.		60.00
Watts and Sergeant's Reports, Supreme Court of Pennsylvania.	9 vols.		54.00
Welford's Equity Pleadings.	8vo. . . . .		1.50
Wharton's Criminal Law of the United States.	6th Edition. 3 vols. 8vo.		22.50
Wharton's Precedents of Indictments and Pleas.	3d Edition. 2 vols. 8vo. . . . .		15.00
Wharton on the Law of Homicide.	8vo. <i>Out of print.</i>		
Wharton's Conflict of Laws, or Private International Law.	8vo. (In preparation.)		
Wharton's Law Lexicon, or Dictionary of Jurisprudence.	2d American Edition. 8vo. . . . .		7.50
Wharton and Stillé's Medical Jurisprudence.	2d Edition. 8vo. . . . .		8.00
Wheaton.	<i>See Selwyn.</i>		
Williams on Executors and Administrators.	5th American Edition. 2 vols. 8vo. . . . .		15.00
Wilson's Digest of Parliamentary Law.	2d Edition. 8vo. . . . .		2.50
Wright's Pennsylvania State Reports.	14 vols. 8vo. . . . .		63.00
Wright's Index (to his 14 volumes of Reports).	8vo. . . . .		4.00







A COLLECTION  
OF  
LEADING CASES  
ON THE  
LAW OF ELECTIONS  
IN THE  
UNITED STATES  
WITH  
NOTES AND REFERENCES TO THE LATEST AUTHORITIES.

BY  
FREDERICK C. BRIGHTLY,  
AUTHOR OF THE FEDERAL DIGEST; THE UNITED STATES DIGEST, ETC.

PHILADELPHIA:  
KAY & BROTHER, 17 AND 19 SOUTH SIXTH STREET,  
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS.  
1871.

18745

---

Entered according to Act of Congress, in the year 1871, by

FREDERICK C. BRIGHTLY,

in the Office of the Librarian of Congress, at Washington.

---

KF

4886

A4

B85

## P R E F A C E .

---

No questions have greater interest for a people possessed of the right of self-government, than those arising out of the exercise of the elective franchise; whilst other constitutional questions affect classes of the community, the ones treated of in this work have reference to the vital principles of our government and come home to every citizen of the republic. The working of our system of election by ballot is, at the present time, the subject of anxious consideration by the British people and Parliament, and presents one of the nicest problems that can engage the attention of the Statesman and Politician. It is, therefore, strange, but nevertheless true, that no work has yet appeared, on this side of the Atlantic, which treats exclusively of the question of popular suffrage, though greatly needed both by the professional man and the general reader.

To supply this want, the author has been induced to make this Collection of Cases, and in the notes to present the numerous authorities that exist on this important

subject. Many of the cases are unreported, or are extant only in Legal Periodicals or scarce Volumes of Reports, not accessible to the general student; others are selected from the Reports of distant States, not usually found in a lawyer's private library; and it is hoped the work will, therefore, prove acceptable to all who desire information on this most interesting of all political questions.

It is, of course, impossible to write a work on a subject exclusively political in its character without an expression of the Author's views upon the subject treated of; a mere collection of decided cases can be made by any one, for his own use, by a reference to the Digests of the several States; but this work has an aim and a purpose, and that is, to call public attention to what the Author sincerely believes to be the greatest vice in our political system, the delegation of discretionary powers, in political cases, to an elective Judiciary, holding by a limited tenure. He believes this to present the feature of greatest danger to the permanency of our institutions, and therefore, he has not hesitated to present his views on this subject in the plainest language that the English tongue is capable of using. He has used the reported cases to illustrate this evil characteristic of modern politics; the difference in the character of the older decisions made by independent judges, and the recent ones decided since this innovation has been made upon the free principles of our ancestors, cannot fail to strike the mind of any reflecting man. If the book shall have a

tendency only to call attention to this great evil, the labor of the Author will not have been thrown away.

In preparing the cases for the press, the Author has corrected numerous errors in the printed reports, and has adopted a uniformity of citation. If he has sometimes been severe in his criticisms, his excuse must be, that no work on a political subject would be worth the purchase, if the Author were not perfectly free and independent in the expression of his opinions; he has done so in no hostile spirit, but with the kindest feelings towards those judges whom he has thus reviewed.

PHILADELPHIA,

1st September 1871.



# C O N T E N T S.

---

	PAGE
WHAT QUESTIONS MAY BE SUBMITTED TO A POPULAR VOTE . . . . .	3
<i>Rice v. Foster</i> , 4 Harrington 479.	
STATES' RIGHTS TO REGULATE THE ELECTIVE FRANCHISE	27
<i>Anderson v. Baker</i> , 23 Maryland 531.	
CONSTITUTIONAL RIGHTS OF ELECTORS . . . . .	44
<i>McCafferty v. Guyer</i> , 59 Penn. St. R. 109.	
REGISTRY LAWS . . . . .	51
<i>Capen v. Foster</i> , 12 Pick. 485.	
FEDERAL QUALIFICATIONS . . . . .	65
<i>Ex parte McIllwee</i> , 3 Am. Law Times 251.	
DISFRANCHISEMENT . . . . .	69
<i>Huber v. Reily</i> , 53 Penn. St. R. 112.	
TEST-OATHS . . . . .	83
<i>Blair v. Ridgely</i> , 41 Mo. 63.	
NATURALIZATION . . . . .	98
<i>Commonwealth v. Lee</i> , 1 Brewst. 273.	
RESIDENCE . . . . .	107
<i>Williams v. Whiting</i> , 11 Mass. 424.	
PAYMENT OF TAXES . . . . .	114
<i>Catlin v. Smith</i> , 2 S. & R. 267.	
VALIDITY OF A MINORITY ELECTION . . . . .	126
<i>Commonwealth v. Read</i> , 2 Ashmead 261.	

	PAGE
DISQUALIFICATIONS FOR OFFICE . . . . .	134
<i>Commonwealth v. Shaver</i> , 3 W. & S. 338.	
MAJORITY FOR DISQUALIFIED PERSON . . . . .	144
<i>Commonwealth v. Cluley</i> , 56 Penn. St. R. 270.	
PROOF OF QUALIFICATION . . . . .	152
<i>Spragins v. Houghton</i> , 3 Illinois 377.	
LIABILITY FOR REJECTING THE VOTE OF A QUALIFIED ELECTOR . . . . .	190
<i>Jenkins v. Waldron</i> , 11 Johns. 114.	
RIGHT OF INTERESTED PARTIES TO VOTE . . . . .	196
<i>Commonwealth v. McCloskey</i> , 2 Rawle 369.	
PLACE OF VOTING . . . . .	214
<i>Chase v. Miller</i> , 41 Penn. St. R. 403.	
ELECTION DISTRICTS . . . . .	238
<i>McDaniels' Case</i> , 3 Penn. L. J. 310.	
PLACE OF HOLDING ELECTIONS . . . . .	251
<i>Chadwick v. Melvin</i> .	
FORM OF TICKETS . . . . .	258
<i>Carpenter v. Ely</i> , 4 Wisconsin 420.	
QUALIFICATION OF ELECTION OFFICERS . . . . .	268
<i>Boileau's Case</i> , 2 Pars. 503.	
ELECTION OFFICERS DE FACTO . . . . .	274
<i>Commonwealth v. Smith</i> , 45 Penn. St. R. 59.	
PRIVILEGES OF ELECTORS . . . . .	277
<i>Swift v. Chamberlain</i> , 3 Conn. 537.	
PROXIES . . . . .	282
<i>Brown v. Commonwealth</i> , 4 Pitts. L. J. 668.	
MAJORITIES . . . . .	286
<i>State v. Adams</i> , 2 Stew. 231.	
DUTIES OF RETURN JUDGES OR CANVASSERS . . . . .	300
<i>State v. Steers</i> , 44 Mo. 223.	
RETURNS . . . . .	307
<i>Hadley v. City of Albany</i> , 33 New York 603.	



	PAGE
EFFECT OF CERTIFICATE . . . . .	314
Hulseman v. Rems, 41 Penn. St. R. 396.	
REQUISITES OF A PETITION TO CONTEST AN ELECTION . . . . .	320
Skerrett's Case, 2 Pars. 509.	
AMENDMENT OF PETITION . . . . .	337
Kneass's Case, 2 Pars. 553.	
STRIKING OUT SPECIFICATIONS . . . . .	351
Mann v. Cassidy, 1 Brewst. 11.	
ISSUE, AND RECOUNTING OF VOTES . . . . .	360
Kneass's Case, 2 Pars. 599.	
COMPETENCY OF WITNESSES . . . . .	366
Reed v. Kneass, 2 Pars. 584.	
ELECTION PAPERS . . . . .	378
Howard v. Shields, 16 Ohio St. R. 184.	
EVIDENCE IN CONTESTED ELECTION CASES . . . . .	385
People v. Pease, 27 New York 45.	
EVIDENCE—REBUTTING TESTIMONY . . . . .	416
Reed v. Kneass.	
IRREGULARITIES WILL NOT VITIATE THE POLL . . . . .	423
People v. Cook, 8 New York 67.	
POWERS OF THE COURTS . . . . .	455
Scranton Borough Election, 1 Luzerne Leg. Obs. 12.	
ACQUISITION OF DOMICIL . . . . .	468
Allentown Election, 28 Leg. Int. 229.	
PURGING THE POLLS . . . . .	480
People v. Holden, 28 Cal. 123.	
REJECTION OF POLLS . . . . .	493
Littlefield v. Green, 1 Chicago Leg. News 330.	
LIMITATION . . . . .	503
Collings's Case, 2 Luzerne Leg. Obs. 57.	
DIVISION OF ELECTION DISTRICT . . . . .	517
Penn District Election Case.	
DECISION AT THE NEXT TERM . . . . .	527
Stevenson v. Lawrence, 1 Brewst. 131.	

	PAGE
DISCONTINUANCE . . . . .	534
<i>Mann v. Cassidy</i> , 1 Brewst. 43.	
APPELLATE JURISDICTION . . . . .	538
<i>Gibbons v. Sheppard</i> , 65 Penn. St. R. 20.	
REHEARING . . . . .	558
<i>Gibbons v. Sheppard</i> , 2 Brewst. 117.	
EFFECT OF COMMISSION . . . . .	573
<i>Ewing v. Thompson</i> , 43 Penn. St. R. 372.	
FAILURE TO ELECT . . . . .	582
<i>Commonwealth v. County Commissioners</i> , 5 Rawle 75.	
COMPENSATION OF ELECTION OFFICERS . . . . .	590
<i>Salter v. County of Philadelphia</i> , 1 Phila. 255.	
CONGRESSIONAL LEGISLATION . . . . .	592
<i>United States v. Quinn</i> , 3 Am. Law Times 180.	
FEEs OF OFFICE PENDING A CONTEST . . . . .	605
<i>Mayfield v. Moore</i> , 3 Chicago Leg. News 114.	
INFLUENCING ELECTIONS . . . . .	612
<i>Jackson v. Walker</i> , 5 Hill 27.	
INJUNCTIONS . . . . .	617
<i>Lawrence v. Knight</i> , 1 Brewst. 67.	
MANDAMUS TO ELECT . . . . .	624
<i>Lamb v. Lynd</i> , 44 Penn. St. R. 336.	
ORGANIZATION OF MUNICIPAL LEGISLATIVE BODIES . . . . .	632
<i>Kerr v. Trego</i> , 47 Penn. St. R. 292.	
OUSTER . . . . .	646
<i>Duffield's Case</i> .	
QUO WARRANTO . . . . .	656, 659
<i>Commonwealth v. Garrigues</i> , 28 Penn. St. R. 9.	
<i>Commonwealth v. Meeser</i> , 44 Penn. St. R. 341.	
TERM OF OFFICE . . . . .	665
<i>Lewis's Case</i> , 29 Penn. St. R. 518.	
VACANCY IN OFFICE . . . . .	670
<i>Commonwealth v. Hanley</i> , 9 Penn. St. R. 513.	

# CONTENTS.

xi

	PAGE
ELECTIONS TO FILL VACANCIES . . . . .	679
Foster v. Scarff, 15 Ohio St. R. 532.	
ELECTION OF JUDGES . . . . .	685
Commonwealth v. Conyngham, 3 Brewst. 214.	
CRIMINAL PROSECUTIONS FOR ILLEGAL VOTING . . . . .	695
Commonwealth v. Aglar, Thach. Cr. Cas. 412.	
REQUISITES OF INDICTMENT FOR ILLEGAL VOTING . . . . .	705
State v. Moore, 3 Dutcher 105.	
INDICTMENTS AGAINST ELECTION OFFICERS . . . . .	711
Commonwealth v. Miller, 2 Pars. 480.	
WAGERS UPON ELECTIONS . . . . .	728
Laval v. Myers, 1 Bailey 486.	
<hr/>	
APPENDIX . . . . .	739
Cumulative Voting.	



# TABLE OF CASES.

	PAGE
Acker, Jansen <i>v.</i> , 23 Wend. 480 . . . . .	428
Acorn, The, 2 Abbott U. S. Rep. 434 . . . . .	106
Acton, People <i>v.</i> , 48 Barb. 524 . . . . .	694
Adams, Case of, Cush. Elect. Cas. 391 . . . . .	451
Adams, Ely <i>v.</i> , 19 Johns. 313 . . . . .	430
Adams, Root <i>v.</i> , 1 Cong. Elect. Cas. 271 . . . . .	268
Adams, State <i>v.</i> , 2 Stew. 231, 239 . . . . .	51, 244, 286, 383, 589, 664
Adams <i>v.</i> Wilson, 1 Cong. Elect. Cas. 373 . . . . .	413
Adams <i>v.</i> Wooldridge, 4 Ill. 255 . . . . .	737
Addison, United States <i>v.</i> , 6 Wall. 291 . . . . .	611
Aglar, Commonwealth <i>v.</i> , Thach. Cr. Cas. 412 . . . . .	695
Albany, City of, Hadley <i>v.</i> , 33 N. Y. 603 . . . . .	307, 669
Albin, Ensworth <i>v.</i> , 46 Mo. 453 . . . . .	64
Albin, State <i>v.</i> , 44 Mo. 346 . . . . .	64
Aldermen, Conway <i>v.</i> , 2 Brewst. 134 . . . . .	64
Allegheny Bridge Co., Commonwealth <i>v.</i> , 20 Penn. St. R. 185 . . . . .	146
Allen <i>v.</i> Hearn, 1 T. R. 56 . . . . .	733, 735
Allen, Page <i>v.</i> , 58 Penn. St. R. 338 . . . . .	50, 62, 689
Allen, People <i>v.</i> , 6 Wend. 486 . . . . .	529
Allentown Election, 28 Leg. Int. 229 . . . . .	468
Almeida, United States <i>v.</i> , Whart. Prec. § 1061 . . . . .	716
Amedy, United States <i>v.</i> , 11 Wheat. 408 . . . . .	485
Amherst, Granby <i>v.</i> , 7 Mass. 1 . . . . .	470, 471
Anderson <i>v.</i> Baker, 23 Md. 531 . . . . .	27, 64, 82, 98, 193
Anderson <i>v.</i> Milliken, 9 Ohio St. R. 568 . . . . .	50, 194
Anderson, State <i>v.</i> , Coxe 318 . . . . .	150
Andrews <i>v.</i> Herne, 1 Lev. 33 . . . . .	728, 729
Andrews, Snyder <i>v.</i> , 6 Barb. 48 . . . . .	429
Ankeny, Jeffries <i>v.</i> , 11 Ohio 372 . . . . .	50, 194
Anon., 1 Wils. 256 . . . . .	345
Anon., 1 Brewst. 158 . . . . .	106
Anon., 1 Brewst. 182 . . . . .	280
Anon., 2 Brewst. 144 . . . . .	114
Anon., Com. Pleas, Phila., Oct. 1848 . . . . .	113
Armstrong <i>v.</i> Miller . . . . .	664

	PAGE
Arris <i>v.</i> Stukely, 2 Mod. 260 . . . . .	607, 610
Ashby <i>v.</i> White, 2 Ld. Raym. 938; 1 Bro. P. C. 45 . . . . .	34, 90, 190, 191, 193, 279, 400.
Ashfield, Case of, Cush. Elect. Cas. 583 . . . . .	267
Attorney-General <i>v.</i> Barstow, 4 Wis. 567 . . . . .	261, 262, 302, 306
Attorney-General <i>v.</i> Utica Insurance Co., 2 Johns. Ch. 389 . . . . .	622
Augustin <i>v.</i> Eggleston, 12 La. An. 366 . . . . .	336, 452
Auld <i>v.</i> Walton, 12 La. An. 129 . . . . .	64
Aurora, The, <i>v.</i> United States, 7 Cranch 382 . . . . .	16
Ayer, Commonwealth <i>v.</i> , Cush. Elect. Cas. 674 . . . . .	727
Babcock, Gale <i>v.</i> , 4 W. C. C. 199 . . . . .	345
Bacon <i>v.</i> Benchley, 2 Cush. 100 . . . . .	194
Bacon <i>v.</i> York County, 26 Maine 490 . . . . .	306
Bailey <i>v.</i> Musgrave, 2 S. & R. 219 . . . . .	339, 567
Bailey <i>v.</i> Simpson, Binns's Just. 498 n. . . . .	281
Bailey, State <i>v.</i> , 8 Shep. 62 . . . . .	711
Baird, Commonwealth <i>v.</i> , 4 S. & R. 141 . . . . .	551
Baker, Anderson <i>v.</i> , 23 Md. 531 . . . . .	27, 64, 82, 98, 193
Ballard, United States <i>v.</i> , 13 Int. R. Rec. 195 . . . . .	710
Bang <i>v.</i> Lauck, 5 Cold. 588 . . . . .	450, 581
Bank <i>v.</i> Commonwealth, 10 Penn. St. R. 448 . . . . .	539
Bank of Newburgh, Reed <i>v.</i> , 6 Paige 337 . . . . .	285
Bank of North America <i>v.</i> Fitzsimons, 3 Binn. 356 . . . . .	546
Bank of Pittsburgh, Slicer <i>v.</i> , 16 How. 571 . . . . .	549
Bankes, Rex <i>v.</i> , 3 Burr. 1454 . . . . .	584
Banon, Galway <i>v.</i> , Long. & Towns. 70 . . . . .	569
Barger, Commonwealth <i>v.</i> , 20 Leg. Int. 101 . . . . .	143, 630, 663
Baring <i>v.</i> Shippen, 2 Binn. 165 . . . . .	138
Barker <i>v.</i> Commonwealth, 19 Penn. St. R. 412 . . . . .	551
Barker <i>v.</i> People, 20 Johns. 457 . . . . .	73, 81, 138
Barlow, Patterson <i>v.</i> , 60 Penn. St. R. 54 . . . . .	50, 63, 125
Barnett, Kennedy <i>v.</i> , 64 Penn. St. R. 141 . . . . .	270
Barney <i>v.</i> McCreery, 1 Cong. Elect. Cas. 167 . . . . .	51
Barrett, Bushel <i>v.</i> , Ry. & Mood. 434 . . . . .	138, 139
Barron, Ex parte, 1 Brewst. 383 . . . . .	105, 106
Barstow, Attorney-General <i>v.</i> , 4 Wis. 567 . . . . .	261, 262, 302, 306
Bartlett, People <i>v.</i> , 6 Wend. 422 . . . . .	443
Barto <i>v.</i> Himrod, 8 N. Y. 483 . . . . .	24
Barzey, Rex <i>v.</i> , 4 M. & S. 253 . . . . .	340, 341, 342
Bates, People <i>v.</i> , 11 Mich. 362 . . . . .	450
Batturs <i>v.</i> Megary, 1 Brewst. 162 . . . . .	256, 334, 335, 355, 359, 501
Baxter, Commonwealth <i>v.</i> , 35 Penn. St. R. 263 . . . . .	317, 319, 663, 677
Baylies, Turner <i>v.</i> , 1 Cong. Elect. Cas. 234 . . . . .	268
Beal <i>v.</i> Ray, 17 Ind. 554 . . . . .	685
Beck <i>v.</i> McGhee, House Journ. 1856, p. 204 . . . . .	255

## TABLE OF CASES.

XV

	PAGE
Beekman v. Bond, 19 Wend. 444 . . . . .	427, 432
Bell's Case . . . . .	368
Bellas, Robins v., 4 Watts 255 . . . . .	508
Benchley, Bacon v., 2 Cush. 100 . . . . .	194
Benedict, State v., 15 Minn. 199 . . . . .	677
Benjamin, Clements v., 12 Johns. 299 . . . . .	428
Benner v. Frey, 1 Binn. 369 . . . . .	339
Benton, Regina v., 9 Dowl. 1021 . . . . .	341
Bernoudy, State v., 36 Mo. 279 . . . . .	302
Berry, Ingerson v., 14 Ohio St. R. 325 . . . . .	382
Bevard v. Hoffman, 18 Md. 479, 483 . . . . .	34, 193
Biddle v. Wing, 1 Cong. Elect. Cas. 504 . . . . .	113
Binder, State v., 38 Mo. 450 . . . . .	133
Bingham v. Cabbot, 3 Dall. 18 . . . . .	533
Binns, Commonwealth v., 17 S. & R. 219 . . . . .	652, 655
Blackwell v. Thompson, 2 Stew. & Port. 348 . . . . .	704
Blair v. Ridgely, 41 Mo. 63 . . . . .	83
Blake, People v., 49 Barb. 9 . . . . .	694
Blanchard v. Stearns, 5 Met. 298 . . . . .	194, 195
Blandford v. Gibbs, 2 Cush. 39 . . . . .	458
Blissell, Rex v., Heywood 360 . . . . .	151
Blockley Election, 2 Pars. 534 . . . . .	266
Boal, State v., 46 Mo. 528 . . . . .	150, 664
Board of Registration, People v., 15 Mich. 156 . . . . .	64
Bodfield v. Padmore, 5 Ad. & E. 785 . . . . .	340
Boggs v. Brooks, 45 Mo. 232 . . . . .	557
Boileau's Case, 2 Pars. 503 . . . . .	268, 328, 452
Bond, Beekman v., 19 Wend. 444 . . . . .	427, 432
Bond, State v., 38 Mo. 425 . . . . .	64
Booth, Fry v., 19 Ohio St. R. 25 . . . . .	451, 502
Boren v. Smith, 1 Chicago Leg. News 170 . . . . .	64
Borough of West Philadelphia, 5 W. & S. 283 . . . . .	24
Bourland v. Hildreth, 26 Cal. 161 . . . . .	237
Bowen v. Hixon, 45 Mo. 340 . . . . .	313, 516
Bowen, Smith v., 11 Mod. 230 . . . . .	345
Bowers, Williams v., 1 Cong. Elect. Cas. 263 . . . . .	268
Boyd v. Negley, 40 Pennr. St. R. 377; 53 Ibid. 387 . . . . .	548
Boyett, State v., 10 Ired. 336 . . . . .	704
Boyton v. Dodsworth, 6 T. R. 681 . . . . .	610
Braddee v. Brownfield, 2 W. & S. 280 . . . . .	546
Bradford, Commonwealth v., 9 Met. 268 . . . . .	411, 703, 710
Bradley, Regina v., 3 Ellis & Ellis 634 . . . . .	267
Breiden v. Paff, 12 S. & R. 430 . . . . .	414
Brenham, People v., 3 Cal. 477 . . . . .	450
Brent, Peyton v., 3 Cr. C. C. 424 . . . . .	309
Bridge, Rex v., 1 M. & S. 76 . . . . .	147, 151

	PAGE
Brisbin, Frost <i>v.</i> , 19 Wend. 21 . . . . .	470
Brooks, Boggs <i>v.</i> , 45 Mo. 232 . . . . .	557
Brower <i>v.</i> O'Brien, 2 Ind. 423 . . . . .	306
Brown <i>v.</i> Commonwealth, 4 Pitts. L. J. 668 . . . . .	282
Brown <i>v.</i> County Commissioners, 10 Penn. St. R. 37 . . . . .	540
Brown <i>v.</i> Keene, 8 Pet. 112 . . . . .	188
Brown <i>v.</i> Leeson, 2 H. Bl. 43 . . . . .	732
Brown <i>v.</i> O'Connell, 36 Conn. 432 . . . . .	694
Brown, White <i>v.</i> , 1 Wall. Jr. 217 . . . . .	470
Brownfield, Braddee <i>v.</i> , 2 W. & S. 280 . . . . .	546
Bruce <i>v.</i> Loan, 2 Cong. Elect. Cas. 482 . . . . .	616
Brunott <i>v.</i> McKee, 6 W. & S. 514 . . . . .	459
Buckwalter <i>v.</i> United States, 11 S. & R. 193 . . . . .	76
Buffum, Seitz <i>v.</i> , 14 Penn. St. R. 69 . . . . .	554
Bull, Calder <i>v.</i> , 3 Dall. 386, 399 . . . . .	87, 201
Bullock, Caulfield <i>v.</i> , 18 B. Mon. 494 . . . . .	193
Bunn <i>v.</i> Riker, 4 Johns. 426 . . . . .	734, 735
Burbridge, Devall <i>v.</i> , 6 W. & S. 529 . . . . .	421
Burnaby, Regina <i>v.</i> , 2 Ld. Raym. 900 . . . . .	717
Burrell, Commonwealth <i>v.</i> , 7 Penn. St. R. 34 . . . . .	664
Bushel <i>v.</i> Barrett, Ry. & Mood. 424 . . . . .	138, 139
Buzzell, Commonwealth <i>v.</i> , 16 Pick. 153 . . . . .	438
Byers, Spackman <i>v.</i> , 6 S. & R. 385 . . . . .	569
Byington <i>v.</i> Vandever, 2 Cong. Elect. Cas. . . . .	395, 655
Byrne <i>v.</i> State, 12 Wis. 519 . . . . .	195
Cabbot, Bingham <i>v.</i> , 3 Dall. 18 . . . . .	533
Cady <i>v.</i> Norton, 14 Pick. 236 . . . . .	438
Calder <i>v.</i> Bull, 3 Dall. 386, 399 . . . . .	87, 201
Calder <i>v.</i> Rutherford, 3 Brod. & Bing. 302 . . . . .	412
Callaway, Ramsey <i>v.</i> , 15 La. An. 464 . . . . .	313
Cambria County Election . . . . .	256
Cambria Iron Co. <i>v.</i> Tomb, 48 Penn. St. R. 388 . . . . .	548
Cambridge Election, Cush. Elect. Cas. 3 . . . . .	489
Cambridge, Rex <i>v.</i> , 3 Burr. 1647 . . . . .	394
Cameron, Lightfoot <i>v.</i> , 2 W. Bl. 1113 . . . . .	279
Cameron <i>v.</i> Lightfoot, 2 W. Bl. 1190 . . . . .	279
Campbell, Graham <i>v.</i> , 3 Cal. 135 . . . . .	450
Campbell, McKay <i>v.</i> , 2 Abbott U. S. Rep. 120 . . . . .	49, 67
Campbell, Vallandigham <i>v.</i> , 41 Cong. Globe 2317 . . . . .	387
Canfield, Scoville <i>v.</i> , 14 Johns. 338 . . . . .	76
Canvassers of Kent Co., People <i>v.</i> , 11 Mich. 111 . . . . .	299
Capen <i>v.</i> Foster, 12 Pick. 485 . . . . .	51, 194, 195
Carman <i>v.</i> Reynolds, 5 Ellis & Bl. 301 . . . . .	568
Carpenter's Case, 2 Pars. 537 . . . . .	276, 334, 345, 353, 384, 449, 509
Carpenter's Case, 14 Penn. St. R. 486 . . . . .	514, 532, 540, 544, 556



## TABLE OF CASES.

xvii

	PAGE
Carpenter <i>v.</i> Ely, 4 Wis. 420 . . . . .	258, 306, 413
Carroll <i>v.</i> Liebenthaler, 19 Am. L. Reg. 448 . . . . .	611
Carson's Case, 2 Lloyd's Debates 23 . . . . .	212
Carson <i>v.</i> McPhetridge, 15 Ind. 327 . . . . .	143, 151
Carter <i>v.</i> Harrison, 5 Blackf. 138 . . . . .	193
Case <i>v.</i> Clarke, 5 Mas. 70 . . . . .	479
Casey's Case, 1 Ash. 126 . . . . .	245, 474
Cassidy, Mann <i>v.</i> , 1 Brewst. 11 . . . . .	334, 335, 349, 351, 359, 377, 383, 414, 449, 454, 466, 467, 492, 501, 534, 550.
Caster <i>v.</i> Wood, Bald. 289 . . . . .	339
Castle <i>v.</i> Reynolds, 10 Watts 52 . . . . .	566
Catlin <i>v.</i> Robinson, 2 Watts 379 . . . . .	567
Catlin <i>v.</i> Smith, 2 S. & R. 267 . . . . .	114, 221
Caulfield <i>v.</i> Bullock, 18 B. Mon. 494 . . . . .	193
Cavers, State <i>v.</i> , 22 Iowa 343 . . . . .	306
Cecil <i>v.</i> Nottingham, 12 Mod. 348 . . . . .	280
Chadwick <i>v.</i> Melvin . . . . .	251, 451, 502
Challen, Commonwealth <i>v.</i> , 13 Penn. St. R. 133 . . . . .	664
Chamberlain, Swift <i>v.</i> , 3 Conn. 537 . . . . .	277
Chambers, Guhr <i>v.</i> , 8 S. & R. 157 . . . . .	345
Champney's Case, 3 Am. L. Rev. 142 . . . . .	267
Chandler, Hunter <i>v.</i> , 45 Mo. 453 . . . . .	277, 309, 581, 611
Chandler <i>v.</i> Main, 16 Wis. 343 . . . . .	237
Chapman's Case, 1 Senate Journ. 1844, p. 88 . . . . .	335
Chapman <i>v.</i> Ferguson, 2 Cong. Elect. Cas. 267 . . . . .	268
Chapman, Keller <i>v.</i> , 34 Cal. 635 . . . . .	450
Chase <i>v.</i> Miller, 41 Penn. St. R. 403, 412, 420 . . . . .	26, 113, 214, 250, 314, 472, 477, 540, 566.
Chenango Mutual Insurance Co., 19 Wend. 635 . . . . .	454
Chester, Case of, Cush. Elect. Cas. 664 . . . . .	452
Chester County Election, Journ. Ass. 241 . . . . .	97
Chester's Case, 1 Dougl. Elect. Cas. 76 . . . . .	395
Chew's Appeal, 9 W. & S. 152 . . . . .	569
Chief Burgess, Dock <i>v.</i> , 7 Watts 181 . . . . .	717
Christ Church <i>v.</i> Pope, 8 Gray 140 . . . . .	454
Christ Church of Reading, McIlvain <i>v.</i> , 28 Leg. Int. 126 . . . . .	623
Christy <i>v.</i> Supervisors of Sacramento County, 39 Cal. 3 . . . . .	694
Church, Davis <i>v.</i> , 1 W. & S. 240 . . . . .	339
Church Street, 54 Penn. St. R. 353 . . . . .	541
Churchill, State <i>v.</i> , 15 Minn. 455 . . . . .	319
Cicott, People <i>v.</i> , 16 Mich. 283 . . . . .	267, 370, 376, 377, 384, 453, 454
Cincinnati, Wilmington and Zanesville Railroad Co. <i>v.</i> Commis- sioners of Clinton County, 1 Ohio St. R. 84 . . . . .	25, 26
Circuit Judge of Mobile, Thompson <i>v.</i> , 9 Ala. 338 . . . . .	306
City of Janesville, Smith <i>v.</i> , 3 Chicago Leg. News 227 . . . . .	26
City of Reading, Moers <i>v.</i> , 21 Penn. St. R. 188 . . . . .	26

	PAGE
City of Syracuse, <i>Kinne v.</i> , 3 Keyes 110 . . . . .	526
Clancey's Case, Fortescue 208 . . . . .	138, 139
Claridge <i>v. Evelyn</i> , 5 Barn. & Ald. 81 . . . . .	129, 151
Clark's Case, 2 Pars. 521 . . . . .	336, 451, 514
Clark <i>v. Commonwealth</i> , 29 Penn. St. R. 129 . . . . .	547
Clark, <i>People v.</i> , 4 Cow. 95 . . . . .	302
Clarke, <i>Case v.</i> , 5 Mas. 70 . . . . .	479
Clarke <i>v. Irwin</i> , 5 Nevada 112 . . . . .	678
Clarke, <i>People v.</i> , 11 Barb. 337 . . . . .	424
Cleaver, <i>Republica v.</i> , 4 Yeates 69 . . . . .	549
Clements <i>v. Benjamin</i> , 12 Johns. 299 . . . . .	428
Clerk of Passaic Co., <i>State v.</i> , 1 Dutch. 354 . . . . .	320
Cline, <i>Ex parte</i> , 1 Ben. 338 . . . . .	441
Clinton County Election, 3 Penn. L. J. 160, 166 . . . . .	266, 336, 348, 537
Clouston, <i>Lightly v.</i> , 1 Taunt. 114 . . . . .	610
Cluley, <i>Commonwealth v.</i> , 56 Penn. St. R. 270 . . . . .	144, 151, 664
Coaks, <i>Regina v.</i> , 28 Eng. L. & Eq. 549; 7 Q. B. 406 . . . . .	151
Cobb, <i>State v.</i> , 2 Kansas 32 . . . . .	677
Coe, <i>Rex v.</i> , Heywood 361 . . . . .	151
Cohon, <i>State v.</i> , 12 Ired. 178 . . . . .	704
Coit, <i>King v.</i> , 4 Day 129 . . . . .	279
Colby, <i>O'Farrall v.</i> , 2 Minn. 180 . . . . .	306
Colden <i>v. Sharpe</i> , 1 Cong. Elect. Cas. 369 . . . . .	268
Collings's Case, 2 Luzerne Leg. Obs. 57 . . . . .	503, 537
Collins's Case, 2 Grant 214 . . . . .	462
Collins, <i>Commonwealth v.</i> , 8 Watts 344 . . . . .	671
Collins, <i>Fort v.</i> , 21 Wend. 109 . . . . .	428
Commissioners of Clinton County, Cincinnati, Wilmington and Zanesville Railroad Co. <i>v.</i> , 1 Ohio St. R. 84 . . . . .	25, 26
<i>Commonwealth v. Aglar</i> , Thach. Cr. Cas. 412 . . . . .	695
<i>Commonwealth v. Allegheny Bridge Co.</i> , 20 Penn. St. R. 185 . . . . .	146
<i>Commonwealth v. Ayer</i> , Cush. Elect. Cas. 674 . . . . .	727
<i>Commonwealth v. Baird</i> , 4 S. & R. 141 . . . . .	551
<i>Commonwealth, Bank v.</i> , 10 Penn. St. R. 448 . . . . .	539
<i>Commonwealth v. Barger</i> , 20 Leg. Int. 101 . . . . .	143, 630, 663
<i>Commonwealth, Barker v.</i> , 19 Penn. St. R. 412 . . . . .	551
<i>Commonwealth v. Baxter</i> , 35 Penn. St. R. 263 . . . . .	317, 319, 663, 677
<i>Commonwealth v. Binns</i> , 17 S. & R. 219 . . . . .	652, 655
<i>Commonwealth v. Bradford</i> , 9 Met. 268 . . . . .	411, 703, 710
<i>Commonwealth, Brown v.</i> , 4 Pitts. L. J. 668 . . . . .	282
<i>Commonwealth v. Burrell</i> , 7 Penn. St. R. 34 . . . . .	664
<i>Commonwealth v. Buzzell</i> , 16 Pick. 153 . . . . .	438
<i>Commonwealth, Clark v.</i> , 29 Penn. St. R. 129 . . . . .	547
<i>Commonwealth v. Cluley</i> , 56 Penn. St. R. 270 . . . . .	144, 151, 664
<i>Commonwealth v. Collins</i> , 8 Watts 344 . . . . .	671
<i>Commonwealth v. Conyngham</i> , 3 Brewst. 214 . . . . .	685

## TABLE OF CASES.

xix

	PAGE
Commonwealth v. County Commissioners, 5 Rawle 75	258, 313, 320,
383, 451, 582.	
Commonwealth v. County Commissioners, 32 Penn. St. R. 218	. 649
Commonwealth, Crutchen v., 6 Whart. 340	. . . . 569
Commonwealth v. Cullen, 13 Penn. St. R. 133	. . . . 664
Commonwealth v. Cuncannon, 3 Brewst. 344	. . . . 64
Commonwealth v. Davis, 2 Leg. & Ins. Rep. 18	. . . . 737
Commonwealth, Dyott v., 5 Whart. 80	. . . . 566
Commonwealth, Edge v., 7 Penn. St. R. 277	. . . . 551
Commonwealth v. Eyre, 1 S. & R. 347	. . . . 281
Commonwealth v. Ford, 5 Penn. St. R. 67	. . . . 143
Commonwealth, Foster v., 8 W. & S. 79	. . . . 546
Commonwealth v. Garrigues, 28 Penn. St. R. 11	514, 556, 557, 630, 656
Commonwealth v. Giles, 1 Gray 466	. . . . 551
Commonwealth v. Gill, 3 Whart. 236	. . . . 340, 342
Commonwealth v. Gillespie, 7 S. & R. 469	. . . . 551, 716
Commonwealth v. Graham, 51 Penn. St. R. 258	. . . . 469
Commonwealth v. Gray, 2 Duvall 372	. . . . 727
Commonwealth v. Green, 4 Whart. 531	. . . . 130
Commonwealth v. Gurley, 45 Penn. St. R. 392	. . . . 541
Commonwealth v. Hanley, 9 Penn. St. R. 513	. . . . 670
Commonwealth, Hartmann v., 5 Penn. St. R. 63	. . . . 554
Commonwealth v. Haworth, 3 Brewst. 445	. . . . 276
Commonwealth, Hazen v., 23 Penn. St. R. 355	. . . . 554
Commonwealth v. Hultz, 6 Penn. St. R. 469	. . . . 339
Commonwealth v. Hunt, 4 Met. 125	. . . . 551
Commonwealth v. Jailer, 7 Watts 366	. . . . 530, 547
Commonwealth v. Jones, 12 Penn. St. R. 365	. . . . 143, 145, 469
Commonwealth v. Judges of the Quarter Sessions, 8 Penn. St. R. 391	26
Commonwealth, Juker v., 20 Penn. St. R. 484	. . . . 256, 258, 449, 451
Commonwealth v. Kaas, 3 Brewst. 422	. . . . 722
Commonwealth v. Kuntzman, 41 Penn. St. R. 429	. . . . 243
Commonwealth v. Leary, 1 Brewst. 270	. . . . 105
Commonwealth v. Lee, 1 Brewst. 273	. . . . 98, 193
Commonwealth v. Leech, 44 Penn. St. R. 332	. . . . 557, 630, 663
Commonwealth, Leib v., 9 Watts 219	. . . . 459
Commonwealth v. Loughlin, 20 Leg. Int. 100	. . . . 143, 630, 663
Commonwealth v. McCloskey, 2 Rawle 369	. . . . 196, 249, 557, 630, 663
Commonwealth v. McCutchen, 2 Pars. 205	. . . . 664
Commonwealth, McElhiney v., 22 Penn. St. R. 365	. . . . 508
Commonwealth v. McKisson, 8 S. & R. 420	. . . . 551
Commonwealth v. Maxwell, 27 Penn. St. R. 444	. . . . 224, 232, 677
Commonwealth v. Mayloy, 57 Penn. St. R. 291	. . . . 567
Commonwealth v. Meeser, 44 Penn. St. R. 341	. . . . 448, 659
Commonwealth v. Miller, 2 Pars. 480	. . . . 195, 711
Commonwealth v. Mohn, 52 Penn. St. R. 243	. . . . 551

	PAGE
Commonwealth, Moyer <i>v.</i> , 7 Penn. St. R. 439 . . . . .	551
Commonwealth <i>v.</i> Paper, 1 Brewst. 263 . . . . .	106
Commonwealth, Parker <i>v.</i> , 6 Penn. St. R. 507 . . . . .	24
Commonwealth <i>v.</i> Peltz, 1 Brewst. 159 . . . . .	125
Commonwealth <i>v.</i> Railroad Co., 20 Penn. St. R. 518 . . . . .	146
Commonwealth <i>v.</i> Read, 2 Ash. 261 . . . . .	126, 151
Commonwealth <i>v.</i> Reed, 18 Pitts. L. J. 131 . . . . .	630, 663
Commonwealth, Rhoads <i>v.</i> , 15 Penn. St. R. 277 . . . . .	544, 569, 693
Commonwealth <i>v.</i> Rupp, 9 Watts 114 . . . . .	721
Commonwealth <i>v.</i> Shaver, 3 W. & S. 338 . . . . .	134
Commonwealth <i>v.</i> Shaw, 7 Met. 52 . . . . .	710
Commonwealth <i>v.</i> Sherban, 8 Watts 212 . . . . .	551, 737
Commonwealth <i>v.</i> Sheriff, 16 S. & R. 304 . . . . .	547
Commonwealth <i>v.</i> Sheriff, 1 Brewst. 183 . . . . .	105, 193
Commonwealth <i>v.</i> Small, 26 Penn. St. R. 31 . . . . .	149, 557, 630
Commonwealth <i>v.</i> Smith, 45 Penn. St. R. 59 . . . . .	274, 467
Commonwealth <i>v.</i> Snowden, 1 Brewst. 218 . . . . .	104
Commonwealth, Stewart <i>v.</i> , 4 S. & R. 194 . . . . .	716
Commonwealth, Street <i>v.</i> , 6 W. & S. 209 . . . . .	464, 539
Commonwealth <i>v.</i> Swift, 4 Whart. 186 . . . . .	671
Commonwealth <i>v.</i> Wallace, Thach. Cr. Cas. 592 . . . . .	703
Commonwealth <i>v.</i> Woelper, 3 S. & R. 29, 43 . . . . .	201, 213, 266
Connelly, Mott <i>v.</i> , 50 Barb. 516 . . . . .	611
Conrades, State <i>v.</i> , 45 Mo. 45 . . . . .	669
Conway <i>v.</i> Aldermen, 2 Brewst. 134 . . . . .	64
Conyngham, Commonwealth <i>v.</i> , 3 Brewst. 214 . . . . .	685
Cook, People <i>v.</i> , 8 N. Y. 67, 89; 14 Barb. 259 . . . . .	267, 276, 313, 370, 382, 384, 397, 423, 451, 452, 502, 523, 529, 711.
Cook, State <i>v.</i> , 41 Mo. 593 . . . . .	64
Cooper <i>v.</i> Galbraith, 3 W. C. C. 546 . . . . .	470
Cooper, Howard <i>v.</i> , 2 Cong. Elect. Cas. 275 . . . . .	502
Corfield <i>v.</i> Coryell, 4 W. C. C. 371 . . . . .	90
Cornwell <i>v.</i> Isham, 1 Day 35 . . . . .	375
Corson <i>v.</i> Hunt, 14 Penn. St. R. 510 . . . . .	554
Coryell, Corfield <i>v.</i> , 4 W. C. C. 371 . . . . .	90
Cosden, Reed <i>v.</i> , 1 Cong. Elect. Cas. 353 . . . . .	413
Cotteral <i>v.</i> Cummins, 6 S. & R. 348 . . . . .	554
Coulton, Drewe <i>v.</i> , 1 East 563 n. . . . .	190, 191, 279
County Commissioners, Brown <i>v.</i> , 10 Penn. St. R. 37 . . . . .	540
County Commissioners, Commonwealth <i>v.</i> , 5 Rawle 75 . . . . .	258, 313, 320, 383, 451, 582.
County Commissioners, Commonwealth <i>v.</i> , 32 Penn. St. R. 218 . . . . .	649
County of Davidson, Louisville and Nashville Railroad Co. <i>v.</i> , 1 Sneed 637 . . . . .	26, 299
County of Philadelphia, Salter <i>v.</i> , 1 Phila. 255 . . . . .	590
County Treasurer's Case . . . . .	343

## TABLE OF CASES.

xxi

	PAGE
Covert, <i>People v.</i> , 1 Hill 674 . . . . .	443
Cowan, <i>Stephens v.</i> , 6 Watts 513 . . . . .	566
Cowles, <i>People v.</i> , 13 N. Y. 350 . . . . .	450, 684
Coxe, <i>Steiner v.</i> , 4 Penn. St. R. 13 . . . . .	508
Crawford <i>v. Wilson</i> , 4 Barb. 504 . . . . .	429, 430
Crescent City Live-stock Landing and Slaughter-house Co., Live- stock Dealers' and Butchers' Association <i>v.</i> , 1 Abbott U. S. Rep. 388 . . . . .	68
Crosbie <i>v. Hurley</i> , 1 Alc. & Nap. 431 . . . . .	607, 610
Cross <i>v. Kaye</i> , 6 T. R. 543 . . . . .	346
Croswell, <i>People v.</i> , 3 Johns. Cas. 337 . . . . .	429
Crowell <i>v. Lambert</i> , 10 Minn. 369 . . . . .	319
Crutchen <i>v. Commonwealth</i> , 6 Whart. 340 . . . . .	569
Cullin <i>v. Morris</i> , 3 Stark. 506 . . . . .	193
Culpepper, <i>McFarland v.</i> , 1 Cong. Elect. Cas. 221 . . . . .	441
Cummings <i>v. Missouri</i> , 4 Wall. 277 . . . . .	86, 87, 88, 90, 97
Cummins, <i>Cotteral v.</i> , 6 S. & R. 348 . . . . .	554
Cuncannon, <i>Commonwealth v.</i> , 3 Brewst. 344 . . . . .	64
Da Costa <i>v. Jones</i> , Cowp. 729 . . . . .	729
Dallas, <i>Respublica v.</i> , 3 Yeates 314 . . . . .	689
Daniels, <i>State v.</i> , 44 N. H. 383 . . . . .	193, 470
Dansey, <i>Usher v.</i> , 4 M. & S. 94 . . . . .	568
Darrall, <i>Moore v.</i> , 4 Hagg. Eccl. 346 . . . . .	474
Davis <i>v. Church</i> , 1 W. & S. 240 . . . . .	339
Davis, <i>Commonwealth v.</i> , 2 Leg. & Ins. Rep. 18 . . . . .	737
Davis, <i>Harrison v.</i> , 2 Cong. Elect. Cas. 341 . . . . .	616
Davis <i>v. Maxwell</i> , 22 La. An. 66 . . . . .	516
Davis, <i>Risewick v.</i> , 19 Md. 82 . . . . .	470
Davis, <i>Rudd v.</i> , 3 Hill 287; 7 Hill 529 . . . . .	428, 430
Davis <i>v. State</i> , 7 Md. 161 . . . . .	40
Davison <i>v. Gill</i> , 1 East 64 . . . . .	508
Davy <i>v. Savadge</i> , Hob. 87 . . . . .	200
Dawes, <i>Rex v.</i> , 4 Burr. 2022 . . . . .	145
Day <i>v. Kent</i> , 1 Oregon 123 . . . . .	449
Deckert's Case . . . . .	213, 335, 350
Delany, <i>Sweeny v.</i> , 1 Penn. St. R. 320 . . . . .	339
Demeyer <i>v. Souzer</i> , 6 Wend. 436 . . . . .	428
Dent, <i>Talbot v.</i> , 9 B. Mon. 526 . . . . .	26
Derwent, <i>Walkhouse v.</i> , 1 W. Bl. 19 . . . . .	729
Devall <i>v. Burbridge</i> , 6 W. & S. 529 . . . . .	421
Diamond <i>v. Watt</i> , Leg. Doc. 1870, p. 1061 . . . . .	335
Dickey <i>v. Hurlburt</i> , 5 Cal. 343 . . . . .	257, 450
Dishon <i>v. Smith</i> , 10 Iowa 212 . . . . .	306, 450, 684
Dixon, <i>Gearhart v.</i> , 1 Penn. St. R. 224 . . . . .	508
Dock <i>v. Chief Burgess</i> , 7 Watts 181 . . . . .	717

	PAGE
Dodd, <i>Ex parte</i> , 6 Eng. 152 . . . . .	677
Dodsworth, <i>Boyter v.</i> , 6 T. R. 681 . . . . .	610
Donegan <i>v. Fletcher</i> , 65 Penn. St. R. 21 . . . . .	533
Doughty <i>v. Hope</i> , 3 Denio 249 . . . . .	442
Douglass <i>v. State</i> , 31 Ind. 479 . . . . .	611
Douglass, <i>State v.</i> , 7 Clarke 413 . . . . .	710, 711
Draper <i>v. Johnston</i> , 1 Cong. Elect. Cas. 703 . . . . .	125, 441
Dresden, <i>Case of</i> , Cush. Elect. Cas. 201 . . . . .	413
Drewe <i>v. Coulton</i> , 1 East 563 n. . . . .	190, 191, 279
Dudley, <i>Morgan v.</i> , 18 B. Mon. 693 . . . . .	193
Duffield's Case . . . . .	646
Duffy, <i>Scott v.</i> , 14 Penn. St. R. 18 . . . . .	736
Dunkle <i>v. Kocker</i> , 11 Barb. 387 . . . . .	431
D'Wolf, <i>Rabaud v.</i> , 1 Paine 587 . . . . .	479
Dyott <i>v. Commonwealth</i> , 5 Whart. 80 . . . . .	566
East India Co., <i>Williams v.</i> , 3 East 192 . . . . .	411, 413
Easton <i>v. Scott</i> , 1 Cong. Elect. Cas. 272 . . . . .	376
Eckford, <i>Haldane v.</i> , L. R. 8 Eq. 631 . . . . .	479
Edge <i>v. Commonwealth</i> , 7 Penn. St. R. 277 . . . . .	551
Eggleston, <i>Augustin v.</i> , 12 La. An. 366 . . . . .	336, 452
Elbin <i>v. Wilson</i> , 33 Md. 135 . . . . .	195, 422
Election of School Directors, 6 Phila. 437 . . . . .	266
Elliott, <i>Good v.</i> , 3 T. R. 702 . . . . .	730
Ellis, <i>Weeks v.</i> , 2 Barb. 320 . . . . .	438, 443
Ellwood, <i>State v.</i> , 12 Wis. 552 . . . . .	266
Elmendorf <i>v. Mayor of New York</i> , 25 Wend. 696 . . . . .	442
Ely <i>v. Adams</i> , 19 Johns. 313 . . . . .	430
Ely, <i>Carpenter v.</i> , 4 Wis. 420 . . . . .	258, 306, 413
Ely <i>v. Peck</i> , 7 Conn. 242 . . . . .	76
English, <i>Miller v.</i> , 1 Zab. 317 . . . . .	258, 451
Ensworth <i>v. Albin</i> , 46 Mo. 453 . . . . .	64
Erie, <i>Trustees of Erie v.</i> , 31 Penn. St. R. 515 . . . . .	508
Evelyn, <i>Claridge v.</i> , 5 Barn. & Ald. 81 . . . . .	129, 151
Ewing <i>v. Filley</i> , 43 Penn. St. R. 384 . . . . .	360, 364, 454, 540, 555, 556, 581, 654.
Ewing, <i>Thompson v.</i> , 1 Brewst. 67, 102-3 . . . . .	50, 111, 124, 229, 236, 237, 251, 273, 277, 281, 305, 334, 349, 359, 360, 365, 415, 449, 452, 453, 467, 501, 515, 566, 581.
Ewing <i>v. Thompson</i> , 43 Penn. St. R. 377 . . . . .	565, 573, 611
Eyre, <i>Commonwealth v.</i> , 1 S. & R. 347 . . . . .	281
Faggot <i>v. Van Thiennen</i> , Cas. Pr. C. P. 75 . . . . .	345
Fairfield, <i>Plunkett's Creek v.</i> , 58 Penn. St. R. 209 . . . . .	541, 544
Farlee <i>v. Runk</i> , 2 Cong. Elect. Cas. 87 . . . . .	113
Farmers' Bank, <i>Murphy v.</i> , 20 Penn. St. R. 415 . . . . .	146

## TABLE OF CASES.

xxiii

PAGE

Farmers' and Mechanics' Bank, Hardenburgh <i>v.</i> , 2 Green Ch. 68 . . . . .	449
Farrar, Gordon <i>v.</i> , 2 Dougl. 411 . . . . .	50
Ferguson, Chapman <i>v.</i> , 2 Cong. Elect. Cas. 267 . . . . .	268
Ferguson, People <i>v.</i> , 8 Cow. 102 . . . . . 264, 265, 267, 369, 382, 384, 390, 396, 436.	
Few, Lewis <i>v.</i> , 5 Johns. 1 . . . . .	427
Filley, Ewing <i>v.</i> , 43 Penn. St. R. 484 . . . . . 360, 364, 454, 540, 555, 556, 581, 654.	
Finley Township Election, 16 Col. Rec. 44 . . . . .	450
Fisher <i>v.</i> Rutherford, Bald. 193 . . . . .	339
Fisher, Tarlton <i>v.</i> , 2 Dougl. 676 . . . . .	279
Fisher, Wright <i>v.</i> , 1 Cong. Elect. Cas. 518 . . . . .	268
Fitzgerald <i>v.</i> Stewart, 53 Penn. St. R. 343 . . . . .	549
Fitzpatrick, State <i>v.</i> , 4 Rhode Island 269 . . . . .	710
Fitzsimons, Bank of North America <i>v.</i> , 3 Binn. 356 . . . . .	546
Fletcher, Donegan <i>v.</i> , 65 Penn. St. R. 21 . . . . .	533
Flint, Pitman <i>v.</i> , 10 Pick. 506 . . . . .	509
Fogg, Hobbs <i>v.</i> , 6 Watts 553 . . . . .	36, 49
Ford, Commonwealth <i>v.</i> , 12 Penn. St. R. 365 . . . . .	143
Foreman, Lyle <i>v.</i> , 1 Dall. 480 . . . . .	247
Forquer, People <i>v.</i> , Breesé 68 . . . . .	678
Forscht <i>v.</i> Green, 53 Penn. St. R. 138 . . . . .	736
Fort <i>v.</i> Collins, 21 Wend. 109 . . . . .	428
Foster, Capen <i>v.</i> , 12 Pick. 485 . . . . .	51, 194, 195
Foster <i>v.</i> Commonwealth, 8 W. & S. 79 . . . . .	546
Foster, Rice <i>v.</i> , 4 Harrington 479 . . . . .	3, 212
Foster <i>v.</i> Scarff, 15 Ohio St. R. 535 . . . . .	128, 258, 679
Foster, Stewart <i>v.</i> , 2 Binn. 110 . . . . .	189, 457
Foust's Case, 31 Penn. St. R. 338 . . . . .	232
Foxcroft, Rex <i>v.</i> , 2 Burr. 1017 . . . . .	129, 133
Francis, Rex <i>v.</i> , 2 Ad. & E. 49 . . . . .	340
Freeland, Mayo <i>v.</i> , 10 Mo. 629 . . . . .	306
Freeman <i>v.</i> Tranah, 12 C. B. 413 . . . . .	567
Frest, State <i>v.</i> , 4 Harrington 558 . . . . .	113
Fretz's Case, Pamph. . . . .	49
Frey, Benner <i>v.</i> , 1 Binn. 369 . . . . .	339
Frost <i>v.</i> Brisbin, 19 Wend. 21 . . . . .	470
Fry <i>v.</i> Booth, 19 Ohio St. R. 25 . . . . .	451, 502
Fuller's Case, 2 East P. C. 831 . . . . .	716
Fuller, Milliken <i>v.</i> , 2 Cong. Elect. Cas. 176 . . . . .	276
Furlong, United States <i>v.</i> , 5 Wheat. 184 . . . . .	723
Fury <i>v.</i> Stone, 2 Dall. 184 . . . . .	569
Galbraith's Case, 3 Votes Ass. 184 . . . . .	267
Galbraith, Cooper <i>v.</i> , 3 W. C. C. 546 . . . . .	470
Gale <i>v.</i> Babcock, 4 W. C. C. 199 . . . . .	345

	PAGE
Galway v. Banon, Long. & Towns. 70 . . . . .	569
Gardener, Husted v., 28 Leg. Int. 140 . . . . .	422
Gardner's Case, 2 Mass. 244 . . . . .	36
Garland, Ex parte, 4 Wall. 333 . . . . .	97
Garrat v. Garrat, 4 Yeates 244 . . . . .	551
Garrigues, Commonwealth v., 28 Penn. St. R. 11 . . . . .	514, 556, 557, 630, 656
Gates v. Neal, 23 Pick. 308 . . . . .	194, 195
Gearhart v. Dixon, 1 Penn. St. R. 224 . . . . .	508
Geebrick v. State, 5 Iowa 491 . . . . .	26
German Lutheran Congregation, Pennsylvania Railroad Co. v., 53 Penn. St. R. 445 . . . . .	541, 548
Geyer, Weckerly v., 11 S. & R. 35 . . . . .	192
Gibbons v. Sheppard, 2 Brewst. 1, 3, 130 . . . . .	50, 106, 335, 450, 453, 492, 493, 502, 526, 558, 623.
Gibbons v. Sheppard, 65 Penn. St. R. 20, 35, 44 . . . . .	256, 257, 335, 336, 349, 467, 538, 693.
Gibbs, Blandford v., 2 Cush. 39 . . . . .	454
Gibbs, Republica v., 3 Yeates 429 . . . . .	48, 97
Gibson v. Hunter, 2 H. Bl. 187 . . . . .	427
Gilbert v. Sykes, 16 East 150 . . . . .	728, 730, 733
Giles, Commonwealth v., 1 Gray 466 . . . . .	551
Giles, State v., 1 Chand. 112 . . . . .	150
Gill, Commonwealth v., 3 Whart. 236 . . . . .	340, 342
Gill, Davison v., 1 East 64 . . . . .	508
Gillespie, Commonwealth v., 7 S. & R. 469 . . . . .	551, 716
Gillespie v. Palmer, 20 Wis. 544 . . . . .	194
Gills, United States v., 2 Cranch C. C. 44 . . . . .	193
Given, Philadelphia v., 60 Penn. St. R. 136 . . . . .	611
Given, Weaver v., 1 Brewst. 140 . . . . .	237, 335, 355, 359, 415, 449, 492, 501
Glascock v. Lyons, 20 Ind. 1 . . . . .	608, 611
Gloucester Election, Cush. Elect. Cas. 97 . . . . .	212
Glover, State v., 41 Mo. 339 . . . . .	87, 89
Godwin, Rex v., 1 Dougl. 382 . . . . .	149
Goetze, State v., 22 Wis. 363 . . . . .	684
Goldsmith, Nichols v., 7 Wend. 160 . . . . .	429, 430
Goldthwaite, State v., 16 Wis. 146 . . . . .	266
Good v. Elliott, 3 T. R. 702 . . . . .	730
Gordon v. Farrar, 2 Dougl. 411 . . . . .	50
Gore, Harvard College v., 5 Pick. 370 . . . . .	189
Gorham v. Campbell, 2 Cal. 135 . . . . .	450
Gotcheus v. Matheson, 58 Barb. 152 . . . . .	82
Governor, The, State v., 1 Dutch. 331, 348 . . . . .	305, 319
Graham, Commonwealth v., 51 Penn. St. R. 258 . . . . .	469
Granby v. Amherst, 7 Mass. 1 . . . . .	470, 471
Gray, Commonwealth v., 2 Duvall 373 . . . . .	727
Gray v. State, 4 Ohio 353 . . . . .	50



## TABLE OF CASES.

XXV

	PAGE
Gray <i>v.</i> State of Delaware, 2 Harrington 76 . . . . .	16, 19
Green, Commonwealth <i>v.</i> , 4 Whart. 531 . . . . .	130
Green, Forscht <i>v.</i> , 53 Penn. St. R. 138 . . . . .	736
Green, Littlefield <i>v.</i> , 1 Chicago Leg. News 330 . . . . .	493
Green <i>v.</i> Rennet, 1 T. R. 782 . . . . .	345
Greenbank, Thayer <i>v.</i> , 1 Brewst. 189 . . . . .	502
Greenleaf <i>v.</i> Low, 4 Denio 168 . . . . .	438
Gregory <i>v.</i> King, 3 Chicago Leg. News 349 . . . . .	736, 737
Gregory, Northrop <i>v.</i> , 2 Abbott U. S. Rep. 505 . . . . .	276
Griswold, Taylor <i>v.</i> , 2 Green 223 . . . . .	283, 284
Grove's Appeal, 37 Penn. St. R. 443 . . . . .	548
Grow, Searcy <i>v.</i> , 15 Cal. 117 . . . . .	491
Guardians, Regina <i>v.</i> , 5 Eng. L. & Eq. 361 . . . . .	133, 299
Guerss, Henkin <i>v.</i> , 12 East 247 . . . . .	731
Guhr <i>v.</i> Chambers, 8 S. & R. 157 . . . . .	345
Guier <i>v.</i> O'Daniel, 1 Binn. 349 n. . . . .	469, 474
Gurley, Commonwealth <i>v.</i> , 45 Penn. St. R. 392 . . . . .	541
Guyer, McCafferty <i>v.</i> , 59 Penn. St. R. 109 . . . . .	44, 81, 97
Hadley <i>v.</i> City of Albany, 33 N. Y. 603 . . . . .	307, 669
Hagner <i>v.</i> Heyberger, 7 W. & S. 107 . . . . .	622
Haines, Hammond <i>v.</i> , 25 Md. 541 . . . . .	26
Haldane <i>v.</i> Eckford, L. R. 8 Eq. 631 . . . . .	479
Hamilton, Rex <i>v.</i> , 7 C. & P. 448 . . . . .	551
Hammond <i>v.</i> Haines, 25 Md. 541 . . . . .	26
Hanley, Commonwealth <i>v.</i> , 9 Penn. St. R. 513 . . . . .	670
Hapgood, Jennison <i>v.</i> , 10 Pick. 77 . . . . .	470
Hapgood, Lincoln <i>v.</i> , 11 Mass. 350 . . . . .	34, 53, 113, 193, 195
Hardenburgh <i>v.</i> Farmers' and Mechanics' Bank, 2 Green Ch. 68 . . . . .	449
Harker, State <i>v.</i> , 4 Harrington 559 . . . . .	616
Harland, Regina <i>v.</i> , 8 Dowl. 323 . . . . .	341
Harman <i>v.</i> Tappenden, 1 East 555 . . . . .	190, 191
Harralson, McCraw <i>v.</i> , 4 Cold. 34 . . . . .	452, 454
Harris, People <i>v.</i> , 29 Cal. 678 . . . . .	703
Harrison, Carter <i>v.</i> , 5 Blackf. 138 . . . . .	193
Harrison <i>v.</i> Davis, 2 Cong. Elect. Cas. 341 . . . . .	616
Harrison, State <i>v.</i> , 38 Mo. 540 . . . . .	306
Hart, State <i>v.</i> , 6 Jones (Law) 389 . . . . .	703
Hartley, Rossett <i>v.</i> , 7 Ad. & E. 552 . . . . .	340
Hartmann <i>v.</i> Commonwealth, 5 Penn. St. R. 63 . . . . .	554
Hartt <i>v.</i> Harvey, 32 Barb. 55 . . . . .	313, 320
Hartwell, People <i>v.</i> , 12 Mich. 508 . . . . .	450, 684
Harvard College <i>v.</i> Gore, 5 Pick. 370 . . . . .	189
Harvey, Hartt <i>v.</i> , 32 Barb. 55 . . . . .	313, 320
Hascall, State <i>v.</i> , 6 N. H. 352 . . . . .	443
Hasket <i>v.</i> Wootan, 1 N. & M. 180 . . . . .	735

	PAGE
Hastings, People <i>v.</i> , 29 Cal. 449 . . . . .	693
Hawk, Thacker <i>v.</i> , 11 Ohio 376 . . . . .	50
Hawkins, Rex <i>v.</i> , 10 East 211 . . . . .	148, 151, 411, 414
Haworth, Commonwealth <i>v.</i> , 3 Brewst. 445 . . . . .	276
Hayes, Stewart <i>v.</i> , 3 Chicago Leg. News 117 . . . . .	151
Haynes, State <i>v.</i> , 13 Cal. 145 . . . . .	150
Haynorth, State <i>v.</i> , 3 Sneed 64 . . . . .	711
Hazen <i>v.</i> Commonwealth, 23 Penn. St. R. 355 . . . . .	554
Hazleton Coal Co., Megargell <i>v.</i> , 8 W. & S. 342 . . . . .	339
Head, People <i>v.</i> , 25 Ill. 328 . . . . .	306
Hearn, Allen <i>v.</i> , 1 T. R. 56 . . . . .	733, 735
Heath, Ex parte, 3 Hill 42 . . . . .	262, 305, 401, 442
Heighland, State <i>v.</i> , 41 Mo. 388 . . . . .	87, 97
Hendesty <i>v.</i> Taft, 23 Md. 512 . . . . .	64
Henkin <i>v.</i> Guerss, 12 East 247 . . . . .	731
Herne, Andrews <i>v.</i> , 1 Lev. 33 . . . . .	728, 729
Heyberger, Hagner <i>v.</i> , 7 W. & S. 107 . . . . .	622
Hicks <i>v.</i> Martin, 9 Mart. (La.) 47 . . . . .	412
Higgins, People <i>v.</i> , 3 Mich. 233 . . . . .	267, 370, 384
Hildreth, Bourland <i>v.</i> , 26 Cal. 161 . . . . .	237
Hill, Rex <i>v.</i> , 2 Ld. Raym. 1415 . . . . .	709
Hilliard, People <i>v.</i> , 29 Ill. 422 . . . . .	306
Hilmantel, State <i>v.</i> , 21 Wis. 566 . . . . .	64, 453
Hilmantel, State <i>v.</i> , 23 Wis. 422 . . . . .	377, 384
Himrod, Barto <i>v.</i> , 8 N. Y. 483 . . . . .	24
Hindson <i>v.</i> Kersey, 1 Day 81 n. . . . .	340, 375
Hiorns, Regina <i>v.</i> , 7 Ad. & Ellis 960; 3 N. & P. 184 . . . . .	147
Hixon, Bowen <i>v.</i> , 45 Mo. 340 . . . . .	313, 516
Hobbs <i>v.</i> Fogg, 6 Watts 553 . . . . .	36, 49
Hoboken Land and Improvement Co., Murray <i>v.</i> , 18 How. 280 . . . . .	74
Hodges's Case . . . . .	479
Hoffman, Bevard <i>v.</i> , 18 Md. 479, 483 . . . . .	34, 193
Holden, People <i>v.</i> , 28 Cal. 123 . . . . .	113, 114, 267, 384, 480, 537, 663
Holland, Rex <i>v.</i> , 4 T. R. 457 . . . . .	346
Hope, Doughty <i>v.</i> , 3 Denio 249 . . . . .	442
Hopkins, Keen <i>v.</i> , 48 Penn. St. R. 445 . . . . .	548
Hopkinton, Case of, Cush. Elect. Cas. 26 . . . . .	489
Hopson, People <i>v.</i> , 1 Denio 575 . . . . .	443
Houghton, Spragins <i>v.</i> , 3 Illinois 377 . . . . .	49, 152
Howard <i>v.</i> Cooper, 2 Cong. Elect. Cas. 275 . . . . .	502
Howard, Ingersoll <i>v.</i> , 19 Am. L. R. 193 . . . . .	97
Howard <i>v.</i> Sexton, 1 Denio 440 . . . . .	443
Howard <i>v.</i> Shields, 16 Ohio St. R. 184 . . . . .	336, 378, 454
Howard, Shirley <i>v.</i> , 3 Chicago Leg. News 230 . . . . .	737
Howard <i>v.</i> Wood, 2 Lev. 245; 2 Jon. 126 . . . . .	610
Howard County, State <i>v.</i> , 41 Mo. 247 . . . . .	581

## TABLE OF CASES.

xxvii

	PAGE
Huber v. Reily, 53 Penn. St. R. 112 . . . . .	43, 45, 49, 69, 543
Huginin v. Ten Eyck, 1 Cong. Elect. Cas. 501 . . . . .	268
Hull, Pratt v., 13 Johns. 334 . . . . .	428
Hulseman v. Rems, 41 Penn. St. R. 396 . . . . .	236, 314, 454, 623, 654, 663
Hultz, Commonwealth v., 6 Penn. St. R. 469 . . . . .	339
Humphrey v. Kingman, 5 Met. 162 . . . . .	125
Hunt, Commonwealth v., 4 Met. 125 . . . . .	551
Hunt, Corson v., 14 Penn. St. R. 510 . . . . .	554
Hunt v. Richards, 4 Kansas 549 . . . . .	113
Hunter v. Chandler, 45 Mo. 453 . . . . .	277, 309, 581, 611
Hunter, Gibson v., 2 H. Bl. 187 . . . . .	427
Hunter, Martin v., 1 Wheat. 304 . . . . .	76
Hurlburt, Dickey v., 5 Cal. 343 . . . . .	257, 451
Hurley, Crosbie v., 1 Alc. & Nap. 231 . . . . .	607, 610
Husted v. Gardener, 28 Leg. Int. 140 . . . . .	422
Huston v. Mitchell, 14 S. & R. 310 . . . . .	567
Hyde v. Stone, 9 Cow. 230 . . . . .	430
Ingersoll v. Howard, 19 Am. L. R. 193 . . . . .	97
Ingersoll, Woods v., 1 Binn. 146 . . . . .	508
Ingerson v. Berry, 14 Ohio St. R. 325 . . . . .	382
Irwin, Clarke v., 5 Nevada 112 . . . . .	678
Isham, Cornwell v., 1 Day 35 . . . . .	375
Jailer, Commonwealth v., 7 Watts 366 . . . . .	530, 547
Jackson, Monroe v., 2 Cong. Elect. Cas. 98 . . . . .	114
Jackson v. Walker, 5 Hill 27 . . . . .	612
Jackson v. Young, 5 Cow. 269 . . . . .	442
Jacobs v. Murray, 15 Cal. 221 . . . . .	450
Jansen v. Acker, 23 Wend. 480 . . . . .	428
Jarvis, Rex v., 1 Burr. 148 . . . . .	709
Jefferson, Steward v., 3 Harrington 335 . . . . .	16, 18
Jeffries v. Ankeny, 11 Ohio 372 . . . . .	50, 194
Jenkins, State v., 43 Mo. 261 . . . . .	677
Jenkins v. Waldron, 11 Johns. 114 . . . . .	190, 279, 401
Jennings v. Reynolds, 4 Kansas 110 . . . . .	736, 737
Jennison v. Hapgood, 10 Pick. 77 . . . . .	470
Johnson, Putnam v., 10 Mass. 488 . . . . .	113, 471
Johnson, State v., 17 Ark. 407 . . . . .	581
Johnston's Case . . . . .	182
Johnston, Draper v., 1 Cong. Elect. Cas. 702 . . . . .	125, 441
Johnston v. Russell, 37 Cal. 670 . . . . .	736
Johnston v. Wilson, 2 N. H. 202 . . . . .	678
Jones, Commonwealth v., 12 Penn. St. R. 365 . . . . .	143, 145, 469
Jones, Da Costa v., Cowp. 729 . . . . .	729
Jones, People v., 20 Cal. 50 . . . . .	313, 482

	PAGE
Jones <i>v.</i> Randall, Cowp. 37 . . . . .	733, 735
Jones, State <i>v.</i> , 19 Ind. 356 . . . . .	306, 450, 684
Jones <i>v.</i> State, 1 Kansas 279 . . . . .	450
Judge of Ninth Judicial Circuit, State <i>v.</i> , 13 Ala. 805 . . . . .	113, 267, 365, 370
Judges of the Quarter Sessions, Commonwealth <i>v.</i> , 8 Penn. St. R. 391 . . . . .	26
Juker <i>v.</i> Commonwealth, 20 Penn. St. R. 484 . . . . .	256, 258, 449, 451
Justices of Middlesex, State <i>v.</i> , Coxe 244 . . . . .	557
Kaas, Commonwealth <i>v.</i> , 3 Brewst. 422 . . . . .	722
Kaye, Cross <i>v.</i> , 6 T. R. 543 . . . . .	346
Keen <i>v.</i> Hopkins, 48 Penn. St. R. 445 . . . . .	548
Keenan, Oakland Railway Co. <i>v.</i> , 5 Penn. St. R. 198 . . . . .	541
Keene, Brown <i>v.</i> , 8 Pet. 112 . . . . .	188
Keller <i>v.</i> Chapman, 34 Cal. 635 . . . . .	450
Kellogg, Roosevelt <i>v.</i> , 20 Johns. 208 . . . . .	470
Kelly, Stryker <i>v.</i> , 7 Hill 9 . . . . .	442
Kelsey, People <i>v.</i> , 34 Cal. 470 . . . . .	694
Kendrick, Regina <i>v.</i> , 5 Ad. & Ellis 49 . . . . .	551
Kennedy <i>v.</i> Barnett, 64 Penn. St. R. 141 . . . . .	279
Kent, Day <i>v.</i> , 1 Oregon 123 . . . . .	449
Kerns, Marshall <i>v.</i> , 2 Swan 68 . . . . .	258, 306, 451
Kerr <i>v.</i> Sharp, 14 S. & R. 399 . . . . .	554
Kerr <i>v.</i> Trego, 47 Penn. St. R. 292 . . . . .	319, 623, 630 632
Kersey, Hindson <i>v.</i> , 1 Day 81 n. . . . .	340, 375
Kilduff, People <i>v.</i> , 15 Ill. 492 . . . . .	266, 306
Kilham <i>v.</i> Ward, 2 Mass. 236 . . . . .	36, 53
Kilpatrick's Case, 31 Penn. St. R. 198 . . . . .	232
King <i>v.</i> Coit, 4 Day 129 . . . . .	279
King, Gregory <i>v.</i> , 3 Chicago Leg. News 349 . . . . .	736, 737
King, Tanner <i>v.</i> , 11 La. 175 . . . . .	474
Kingman, Humphrey <i>v.</i> , 5 Met. 162 . . . . .	125
Kinne <i>v.</i> City of Syracuse, 3 Keyes 110 . . . . .	526
Kintzer, Mitchell <i>v.</i> , 5 Penn. St. R. 216 . . . . .	347
Kline <i>v.</i> Myers, 2 Cong. Elect. Cas. 574 . . . . .	365
Kneass's Case, 2 Pars. 553 . . . . .	189, 281, 434, 336, 337, 353, 355, 359, 360, 452, 453, 465, 466, 509, 537.
Kneass, Reed <i>v.</i> , 2 Pars. 584; 1 Phila. 162 . . . . .	366, 377, 414, 416
Kneass, Wallington <i>v.</i> , 15 Penn. St. R. 313 . . . . .	556
Knight, Lawrence <i>v.</i> , 1 Brewst. 67 . . . . .	617
Knowles <i>v.</i> Yeates, 31 Cal. 82 . . . . .	257, 451, 502
Kocker, Dunckle <i>v.</i> , 11 Barb. 387 . . . . .	431
Koplin, Labar <i>v.</i> , 4 N. Y. 548 . . . . .	428
Kopplekom, People <i>v.</i> , 16 Mich. 342 . . . . .	64, 453
Kortz, Van Steenburgh <i>v.</i> , 10 Johns. 167 . . . . .	443

## TABLE OF CASES.

xxix

	PAGE
Kugler's Appeal, 55 Penn. St. R. 123 . . . . .	526
Kuntzman, Commonwealth v., 41 Penn. St. R. 429 . . . . .	243
Labar v. Koplin, 4 N. Y. 548 . . . . .	428
Lacoste, People v., 37 N. Y. 192 . . . . .	664
Lamb v. Lynd, 44 Penn. St. R. 336 . . . . .	624
Lambert, Crowell v., 10 Minn. 369 . . . . .	319
Lancaster Election, 4 Votes Assembly 125, 127 . . . . .	212, 449
Lane, Stanton v., 2 Cong. Elect. Cas. 637 . . . . .	655
Lansing v. Lansing, 8 Johns. 454 . . . . .	734, 735
Latimer v. Patton, 1 Cong. Elect. Cas. 69 . . . . .	267
Lauck, Bang v., 5 Cold. 588 . . . . .	450, 581
Laval v. Myers, 1 Bailey 486 . . . . .	728
Law v. Merrills, 6 Wend. 276 . . . . .	431
Lawrence, Ex parte, 5 Binn. 304 . . . . .	530
Lawrence v. Knight, 1 Brewst. 67 . . . . .	617
Lawrence, Stevenson v., 1 Brewst. 126, 131 . . . . .	515, 527, 547
Lawrence, Tioga v., 2 Watts 43 . . . . .	544
Leary, Commonwealth v., 1 Brewst. 270 . . . . .	105
Lee, Commonwealth v., 1 Brewst. 273 . . . . .	98, 193
Leech, Commonwealth v., 44 Penn. St. R. 332 . . . . .	557, 630, 663
Leeson, Brown v., 2 H. Bl. 43 . . . . .	732
Lehman v. McBride, 15 Ohio St. R. 573 . . . . .	237, 556
Lehre, State v., 7 Rich. 234 . . . . .	454
Leib v. Commonwealth, 9 Watts 219 . . . . .	459
Leisenring, Lloyd v., 7 Watts 294 . . . . .	736
Lelar's Case . . . . .	334
Levering v. Railroad Co., 8 W. & S. 463 . . . . .	546
Lewis's Case, 29 Penn. St. R. 518 . . . . .	665
Lewis v. Few, 5 Johns. 1 . . . . .	427
Lewis, Williamson v., 39 Penn. St. R. 9 . . . . .	530
Liebenthaler, Carroll v., 19 Am. L. Reg. 448 . . . . .	611
Lightfoot v. Cameron, 2 W. Bl. 1113 . . . . .	279
Lightfoot, Cameron v., 2 W. Bl. 1190 . . . . .	279
Lightly v. Clouston, 1 Taunt. 114 . . . . .	610
Lincoln v. Hapgood, 11 Mass. 350 . . . . .	34, 53, 113, 193, 195
Littlefield v. Green, 1 Chicago Leg. News 493 . . . . .	493
Live-stock Dealers' and Butchers' Association v. Crescent City Live-stock Landing and Slaughter-house Co., 1 Abbott U. S. Rep. 388 . . . . .	68
Lloyd v. Leisenring, 7 Watts 294 . . . . .	736
Loan, Bruce v., 2 Cong. Elect. Cas. 482 . . . . .	616
Locust Ward Election, 4 Penn. L. J. 341 . . . . .	281, 376, 377, 451, 502
Lombard v. Oliver, 7 Allen 155 . . . . .	195
Loose, Schuylkill Navigation Co. v., 19 Penn. St. R. 18 . . . . .	543, 546
Loughlin, Commonwealth v., 20 Leg. Int. 100 . . . . .	143, 630, 663

	PAGE
Louisville and Nashville Railroad Co. v. County of Davidson, 1 Sneed 637 . . . . .	26, 299
Lovett, Mace v., 5 Burr. 2833 . . . . .	346
Low, Greenleaf v., 4 Denio 168 . . . . .	438
Lowry, Miller v., 5 Phila. 202 . . . . .	319, 623
Loxdale, Rex v., 1 Burr. 447 . . . . .	77, 529
Luddington v. Peck, 2 Conn. 200 . . . . .	279
Luzerne County Election, 3 Penn. L. J. 155 . . . . .	266
Lyle v. Foreman, 1 Dall. 480 . . . . .	247
Lynd, Lamb v., 44 Penn. St. R. 336 . . . . .	624
Lyons, Glascock v., 20 Ind. 1 . . . . .	608, 611
McBride, Lehman v., 15 Ohio St. R. 573 . . . . .	237, 556
McCafferty v. Guyer, 59 Penn. St. R. 109 . . . . .	44, 81, 97
McCarthy, Smith v., 56 Penn. St. R. 359 . . . . .	26, 623
McClellan, Respublica v., 4 Yeates 399 . . . . .	521
McCloskey, Commonwealth v., 2 Rawle 369 . . . . .	196, 249, 557, 630
McCoy, Speise v., 6 W. & S. 485 . . . . .	736
McCraw v. Harralson, 4 Cold. 34 . . . . .	452, 454
McCreery, Barney v., 1 Cong. Elect. Cas. 167 . . . . .	51
McCutchen, Commonwealth v., 2 Pars. 205 . . . . .	664
McDaniels's Case, 3 Penn. L. J. 310 . . . . .	111, 113, 229, 238, 281, 376, 377, 467, 492.
McDonald, State v., 4 Harrington 555 . . . . .	193, 195
McElhiney v. Commonwealth, 22 Penn. St. R. 365 . . . . .	508
McFarland v. Culpepper, 1 Cong. Elect. Cas. 221 . . . . .	441
McFarland v. Purviance, 1 Cong. Elect. Cas. 131 . . . . .	441
McGhee, Beck v., House Journ. 1856, p. 204 . . . . .	255
McGuire, State v., 7 Humph. 54 . . . . .	703
McIllwee, Ex parte, 3 Am. L. Times 251 . . . . .	49, 65
McIlvain v. Christ Church of Reading, 28 Leg. Int. 126 . . . . .	623
McKay v. Campbell, 2 Abbott U. S. Rep. 120 . . . . .	49, 67
McKee, Brunott v., 6 W. & S. 514 . . . . .	459
McKinney v. O'Connor, 26 Texas 5 . . . . .	450, 452
McKinney, Reynolds v., 4 Kansas 94 . . . . .	736, 737
McKisson, Commonwealth v., 8 S. & R. 420 . . . . .	551, 554
McManus, People v., 34 Barb. 620 . . . . .	266
McMartin v. Taylor, 2 Barb. 356 . . . . .	428
McMasters, Smyth v., 2 P. A. Browne 182 . . . . .	734, 736
McNeely v. Woodruff, 1 Green 352 . . . . .	454
McPhetridge, Carson v., 15 Ind. 327 . . . . .	143, 151
Mace v. Lovett, 5 Burr. 2833 . . . . .	346
Maclay, Reichly v., 2 W. & S. 59 . . . . .	736
Macomber, State v., 7 Rhode Island 349 . . . . .	703
Madison, Marbury v., 1 Cranch 137 . . . . .	575
Maddox v. State, 32 Ind. 111 . . . . .	479

## TABLE OF CASES.

xxxi

	PAGE
Magruder, Wilcox <i>v.</i> , 7 West. L. J. 507 . . . . .	452
Main, Chandler <i>v.</i> , 16 Wis. 343 . . . . .	237
Malden, Case of, Cush. Elect. Cas. 377 . . . . .	189
Mallary <i>v.</i> Merrill, 1 Cong. Elect. Cas. 328 . . . . .	268
Mallinson, Rex <i>v.</i> , 2 Burr. 679 . . . . .	716
Mann <i>v.</i> Cassidy, 1 Brewst. 11 . . . . . 334, 335, 349, 351, 359, 377, 383, 414, 449, 454, 466, 467, 492, 501, 534, 550.	
Mansfield Election, Cush. Elect. Cas. 17 . . . . .	581
Marbury <i>v.</i> Madison, 1 Cranch 137 . . . . .	575
March <i>v.</i> Pigot, 5 Burr. 2802 . . . . .	729
Marlow, State <i>v.</i> , 15 Ohio St. R. 114 . . . . .	663
Marshall <i>v.</i> Kerns, 2 Swan 68 . . . . . 258, 306, 451	
Marshall, State <i>v.</i> , 45 N. H. 281 . . . . .	711
Marshall, Turney <i>v.</i> , 2 Cong. Elect. Cas. 167 . . . . .	51
Martin, Hicks <i>v.</i> , 9 Mart. (La.) 47 . . . . .	412
Martin <i>v.</i> Hunter, 1 Wheat. 304 . . . . .	76
Martin, People <i>v.</i> , 12 Cal. 409 . . . . .	685
Martin, Steel <i>v.</i> , 5 West. Jur. 33 . . . . .	336
Mather, People <i>v.</i> , 4 Wend. 246 . . . . .	431
Matheson, Gotcheus <i>v.</i> , 58 Barb. 152 . . . . .	82
Matteson, People <i>v.</i> , 17 Ill. 167 . . . . .	266
Maxwell, Commonwealth <i>v.</i> , 27 Penn. St. R. 444 . . . . . 224, 232, 677	
Maxwell, Davis <i>v.</i> , 22 La. An. 66 . . . . .	516
Mayfield, Moore <i>v.</i> , 47 Ill. 167 . . . . .	557
Mayfield <i>v.</i> Moore, 3 Chicago Leg. News 114 . . . . .	605
Mayloy, Commonwealth <i>v.</i> , 57 Penn. St. R. 291 . . . . .	567
Mayo <i>v.</i> Freeland, 10 Mo. 629 . . . . .	306
Mayor and Common Council of Baltimore <i>v.</i> State, 15 Md. 459 . . . . . 41, 42	
Mayor of Brooklyn, Patchin <i>v.</i> , 13 Wend. 664 . . . . .	577
Mayor of New York, Elmendorf <i>v.</i> , 25 Wend. 696 . . . . .	442
Maysville and Lexington Railroad Co., Slack <i>v.</i> , 13 B. Mon. 1 . . . . .	26
Mayworm, People <i>v.</i> , 5 Mich. 146 . . . . .	267
Meeser, Commonwealth <i>v.</i> , 44 Penn. St. R. 341 . . . . . 448, 659	
Megargell <i>v.</i> Hazleton Coal Co., 8 W. & S. 342 . . . . .	339
Megary, Batturs <i>v.</i> , 1 Brewst. 162 . . . . . 256, 334, 335, 355, 359, 501	
Megoun, Pike <i>v.</i> , 44 Mo. 492 . . . . .	196
Melvin, Chadwick <i>v.</i> . . . . . 251, 451, 502	
Memphis Railroad, People's Railroad <i>v.</i> , 10 Wall. 50 . . . . .	26
Merrill, Mallary <i>v.</i> , 1 Cong. Elect. Cas. 328 . . . . .	268
Merrills, Law <i>v.</i> , 6 Wend. 276 . . . . .	431
Messmore, State <i>v.</i> , 14 Wis. 115 . . . . .	302
Milbank, Powell <i>v.</i> , 1 T. R. 399 n. . . . .	610
Milbank, Powell <i>v.</i> , 2 W. Bl. 851 . . . . .	411
Milborne Port, Case of, 1 Dougl. Elect. Cas. 67 . . . . .	395
Miller, Armstrong <i>v.</i> . . . . .	664

	PAGE
Miller, Chase <i>v.</i> , 41 Penn. St. R. 408, 412, 420	26, 113, 214, 250,
314, 472, 477, 540, 566.	
Miller, Commonwealth <i>v.</i> , 2 Pars. 480	195, 711
Miller <i>v.</i> English, 1 Zab. 317	258, 451
Miller <i>v.</i> Lowry, 5 Phila. 202	319, 623
Miller, People <i>v.</i> , 16 Mich. 56	319
Miller <i>v.</i> Rucker, 1 Bush 135	193
Miller <i>v.</i> Thompson, 2 Cong. Elect. Cas. 118	113
Milliken, Anderson <i>v.</i> , 9 Ohio St. R. 568	50, 194
Milliken <i>v.</i> Fuller, 2 Cong. Elect. Cas. 176	276
Minnick, State <i>v.</i> , 15 Iowa 123	711
Missouri, Cummings <i>v.</i> , 4 Wall. 277	86, 87, 88, 90, 97
Mitchell, Huston <i>v.</i> , 14 S. & R. 310	567
Mitchell <i>v.</i> Kinzer, 5 Penn. St. R. 216	347
Moers <i>v.</i> City of Reading, 21 Penn. St. R. 188	26
Moffet, Myers <i>v.</i> , 1 Brewst. 230	453, 493, 502
Mohawk and Hudson Railroad Election, 19 Wend. 135	438
Mohn, Commonwealth <i>v.</i> , 52 Penn. St. R. 243	551
Monday, Rex <i>v.</i> , Cowp. 530	148, 151
Monroe <i>v.</i> Jackson, 2 Cong. Elect. Cas. 98	114
Moore <i>v.</i> Darrall, 4 Hagg. Eccl. 346	474
Moore <i>v.</i> Mayfield, 47 Ill. 167	557
Moore, Mayfield <i>v.</i> , 3 Chicago Leg. News 114	605
Moore, State <i>v.</i> , 3 Dutcher 105	705
Moran <i>v.</i> Rennard, 3 Brewst. 601	193
Morgan <i>v.</i> Dudley, 18 B. Mon. 693	193
Morgan <i>v.</i> Quackenbush, 22 Barb. 77	305
Morris, Cullen <i>v.</i> , 3 Stark. 506	193
Morris, State <i>v.</i> , 7 Blackf. 607	704
Morrison <i>v.</i> Springer, 15 Iowa 304	49, 237
Moses, Nolton <i>v.</i> , 3 Barb. 36	431
Mott <i>v.</i> Connelly, 50 Barb. 516	611
Mott <i>v.</i> Railroad, 30 Penn. St. R. 9	636
Moyer <i>v.</i> Commonwealth, 7 Penn. St. R. 439	551
Murphy, Ex parte, 7 Cow. 153	397, 454
Murphy <i>v.</i> Farmers' Bank, 20 Penn. St. R. 415	146
Murphy, United States <i>v.</i> , 16 Pet. 203	374
Murray <i>v.</i> Hoboken Land and Improvement Co., 18 How. 280	74
Murray, Jacobs <i>v.</i> , 15 Cal. 221	450
Murray, People <i>v.</i> , 15 Cal. 221	257
Musgrave, Bailey <i>v.</i> , 2 S. & R. 219	339, 567
Myers, Kline <i>v.</i> , 2 Cong. Elect. Cas. 574	365
Myers, Laval <i>v.</i> , 1 Bailey 486	728
Myers <i>v.</i> Moffet, 1 Brewst. 230	453, 493, 502
Myers, Spear <i>v.</i> , 6 Barb. 445	431
Mytinger <i>v.</i> Springer, 3 W. & S. 405	736



## TABLE OF CASES.

xxxiii

	PAGE
Neal, Gates <i>v.</i> , 23 Pick. 308 . . . . .	194, 195
Negley, Boyd <i>v.</i> , 40 Penn. St. R. 377; 53 Ibid. 387 . . . . .	548
Newcastle Election, 1 Votes Assembly 124 . . . . .	450
New Jersey Case, 2 Cong. Elect. Cas. 19 . . . . .	413
Nichols <i>v.</i> Goldsmith, 7 Wend. 160 . . . . .	429, 430
Nolton <i>v.</i> Moses, 3 Barb. 36 . . . . .	431
Northampton Election, 4 Votes Assembly 658 . . . . .	450
Northrop <i>v.</i> Gregory, 2 Abbott U. S. Rep. 505 . . . . .	276
Northumberland County Election, 1 Phila. 446 . . . . .	336
North Whitehall <i>v.</i> South Whitehall, 3 S. & R. 121 . . . . .	521
Norton, Cady <i>v.</i> , 14 Pick. 236 . . . . .	438
Norway, Sprague <i>v.</i> , 31 Cal. 175 . . . . .	450, 452
Nottingham, Cecil <i>v.</i> , 12 Mod. 348 . . . . .	280
Noyes, State <i>v.</i> , 10 Fost. 279 . . . . .	26
Oakland Railway Co. <i>v.</i> Keenan, 56 Penn. St. R. 198 . . . . .	541
Oates <i>v.</i> Shepherd, 2 Stra. 1272 . . . . .	345
O'Brien, Brower <i>v.</i> , 2 Ind. 423 . . . . .	306
O'Connell, Brown <i>v.</i> , 36 Conn. 432 . . . . .	694
O'Connor, McKinney <i>v.</i> , 26 Texas 5 . . . . .	450, 452
O'Daniel, Guier <i>v.</i> , 1 Binn. 349 n. . . . .	469, 474
O'Farrall <i>v.</i> Colby, 2 Minn. 180 . . . . .	306
Olin, State <i>v.</i> , 23 Wis. 309 . . . . .	377, 413
Olive <i>v.</i> O'Riley, Minor 410 . . . . .	384
Oliver, Lombard <i>v.</i> , 7 Allen 155 . . . . .	195
O'Neill, State <i>v.</i> , 24 Wis. 149 . . . . .	26
Opinion of Justices, 44 N. H. 633 . . . . .	237
Opinion of the Judges, 38 Maine 597 . . . . .	150, 267
Opinion of the Judges, 30 Conn. 591 . . . . .	237
Opinion of the Judges, 1 Met. 580 . . . . .	114
Opinion of the Judges, 5 Met. 587; Cush. Elect. Cas. 436 . . . . .	113
Opinion of the Judges, 5 Met. 591 . . . . .	125
Opinion of the Judges, Cush. Elect. Cas. 120 . . . . .	189
O'Riley, Olive <i>v.</i> , Minor 410 . . . . .	384
Orvis, State <i>v.</i> , 20 Wis. 235 . . . . .	684
Oulton, People <i>v.</i> , 28 Cal. 44 . . . . .	611
Padmore, Bodfield <i>v.</i> , 5 Ad. & Ellis 785 . . . . .	340
Paff, Breiden <i>v.</i> , 12 S. & R. 430 . . . . .	414
Page <i>v.</i> Allen, 58 Penn. St. R. 338 . . . . .	50, 62, 689
Palmer, Gillespie <i>v.</i> , 20 Wis. 544 . . . . .	194
Paper, Commonwealth <i>v.</i> , 1 Brewst. 263 . . . . .	106
Parker <i>v.</i> Commonwealth, 6 Penn. St. R. 507 . . . . .	24
Parker, Regina <i>v.</i> , 3 Ad. & Ellis 292 . . . . .	719
Parry, Rex <i>v.</i> , 14 East 549 . . . . .	148, 151
Parry, Rex <i>v.</i> , 6 Ad. & Ellis 810; 2 N. & P. 414 . . . . .	145

	PAGE
Passyunk Election . . . . .	274
Patchin v. Mayor of Brooklyn, 13 Wend. 664 . . . . .	577
Patterson v. Barlow, 60 Penn. St. R. 54 . . . . .	50, 63, 125
Patton, Latimer v., 1 Cong. Elect. Cas. 69 . . . . .	267
Pearce v. State, 1 Sneed 637 . . . . .	710
Pease, People v., 30 Barb. 588 ; 27 N. Y. 45 . . . . .	106, 189, 264, 369, 384, 385, 610.
Peavey v. Robbins, 3 Jones (Law) 339 . . . . .	193
Peay, Schenck v., . . . . .	678
Peck, Ely v., 7 Conn. 242 . . . . .	76
Peck, Luddington v., 2 Conn. 700 . . . . .	279
Peck, People v., 11 Wend. 604 . . . . .	442
Peck v. Weddell, 17 Ohio St. R. 271 . . . . .	623, 663
Peltz, Commonwealth v., 1 Brewst. 159 . . . . .	125
Penelope, The, United States v., 2 Pet. Ad. 450 . . . . .	247, 470, 474
Penn District Election, 2 Pars. 526 . . . . .	451, 502
Penn District Election Case . . . . .	517, 523
Pennsylvania Railroad Co. v. German Lutheran Congregation, 53 Penn. St. R. 445 . . . . .	541, 548
People v. Acton, 48 Barb. 524 . . . . .	694
People v. Allen, 6 Wend. 486 . . . . .	529
People, Barker v., 20 Johns. 457 . . . . .	73, 81, 138
People v. Bartlett, 6 Wend. 422 . . . . .	443
People v. Bates, 11 Mich. 362 . . . . .	450
People v. Blake, 49 Barb. 9 . . . . .	694
People v. Board of Registration, 15 Mich. 156 . . . . .	64
People v. Brenham, 3 Cal. 477 . . . . .	450
People v. Canvassers of Kent Co., 11 Mich. 111 . . . . .	299
People v. Cicott, 16 Mich. 283 . . . . .	267, 370, 376, 377, 384, 453, 454
People v. Clark, 4 Cow. 95 . . . . .	302
People v. Clarke, 11 Barb. 337 . . . . .	424
People v. Cook, 8 N. Y. 67, 89 ; 14 Barb. 259 . . . . .	267, 276, 313, 370, 382, 384, 397, 423, 451, 452, 502, 523, 529, 711.
People v. Covert, 1 Hill 674 . . . . .	443
People v. Cowles, 13 N. Y. 350 . . . . .	450, 684
People v. Crosswell, 3 Johns. Cas. 337 . . . . .	429
People v. Ferguson, 8 Cow. 102 . . . . .	264, 265, 267, 369, 382, 384, 390, 396, 436.
People v. Forquer, Breese 68 . . . . .	678
People v. Harris, 29 Cal. 678 . . . . .	703
People v. Hartwell, 12 Mich. 508 . . . . .	450, 684
People v. Hastings, 29 Cal. 449 . . . . .	693
People v. Head, 25 Ill. 328 . . . . .	306
People v. Higgins, 3 Mich. 233 . . . . .	267, 370, 384
People v. Hilliard, 29 Ill. 422 . . . . .	306
People v. Holden, 28 Cal. 123 . . . . .	113, 114, 267, 384, 480, 537, 663

## TABLE OF CASES.

xxxv

	PAGE
People v. Hopson, 1 Denio 575 . . . . .	443
People v. Jones, 20 Cal. 50 . . . . .	313, 482
People v. Kelsey, 34 Cal. 470 . . . . .	694
People v. Kilduff, 15 Ill. 492 . . . . .	266, 306
People v. Kopplekom, 16 Mich. 342 . . . . .	64, 453
People v. Lacoste, 37 N. Y. 192 . . . . .	664
People v. McManus, 34 Barb. 620 . . . . .	266
People v. Martin, 12 Cal. 409 . . . . .	685
People v. Mather, 4 Wend. 246 . . . . .	431
People v. Matteson, 17 Ill. 167 . . . . .	266
People v. Mayworm, 5 Mich. 146 . . . . .	267
People v. Miller, 16 Mich. 56 . . . . .	319
People v. Murray, 15 Cal. 221 . . . . .	257
People v. Oulton, 28 Cal. 44 . . . . .	611
People v. Pease, 30 Barb. 588; 27 N. Y. 45 . . . . .	106, 189, 264, 369, 384, 385, 610.
People v. Peck, 11 Wend. 604 . . . . .	442
People, Piatt v., 29 Ill. 54, 72 . . . . .	449, 451, 496
People v. Porter, 6 Cal. 26 . . . . .	685
People v. Raymond, 37 N. Y. 428 . . . . .	694
People v. Reynolds, 5 Gilman 1 . . . . .	26
People v. Riley, 15 Cal. 48 . . . . .	113
People v. Roe, 1 Hill 470 . . . . .	427
People v. Rosborough, 14 Cal. 180 . . . . .	677, 685
People v. Saxton, 22 N. Y. 309 . . . . .	264, 370
People v. Schemerhorn, 19 Barb. 540 . . . . .	448
People v. Seaman, 5 Denio 409 . . . . .	267, 390, 401
People v. Smith, 51 Ill. 177 . . . . .	467, 557
People v. Smyth, 28 Cal. 21 . . . . .	608, 611
People v. Stevens, 5 Hill 616 . . . . .	262, 264, 443
People v. Tieman, 30 Barb. 193 . . . . .	608, 611
People v. Tisdale, 1 Dougl. 59 . . . . .	267, 370, 384
People v. Town of Fairbury, 51 Ill. 149 . . . . .	631
People v. Turnpike Co., 23 Wend. 228 . . . . .	401
People v. Tuthill, 31 N. Y. 550 . . . . .	454
People v. Vail, 20 Wend. 12 . . . . .	262, 265, 313, 382, 383, 390, 405, 437
People v. Van Cleve, 1 Mich. 362 . . . . .	306
People v. Van Slyck, 4 Cow. 297 . . . . .	262, 265, 302, 305, 382, 390, 393, 396, 436.
People v. Weller, 11 Cal. 49 . . . . .	685
People v. White, 24 Wend. 525 . . . . .	443
People's Railroad v. Memphis Railroad, 10 Wall. 50 . . . . .	26
Petersfield Case, 3 Dougl. Elect. Cas. 6 . . . . .	395
Petit v. Rosseau, 15 La. 239 . . . . .	608, 611
Peyton v. Brent, 3 Cr. C. C. 424 . . . . .	309
Philadelphia v. Given, 60 Penn. St. R. 136 . . . . .	611

	PAGE
Philips, <i>Rex v.</i> , 2 Stra. 921 . . . . .	724
Philips <i>v.</i> Wickham, 1 Paige 590, 598 . . . . .	283, 447
Piatt <i>v.</i> People, 29 Ill. 54, 72 . . . . .	449, 451, 496
Pickwood <i>v.</i> Wright, 1 H. Bl. 643 . . . . .	569
Pigot, <i>March v.</i> , 5 Burr. 2802 . . . . .	729
Pigott's Case, 2 Cong. Elect. Cas. 463 . . . . .	113
Pike <i>v.</i> Megoun, 44 Mo. 492 . . . . .	196
Pitman <i>v.</i> Flint, 10 Pick. 509 . . . . .	509
Pitt, <i>Rex v.</i> , 3 Burr. 1335 . . . . .	140
Plunkett's Creek <i>v.</i> Fairfield, 58 Penn. St. R. 209 . . . . .	541, 544
Pole, <i>Rex v.</i> , 7 Mod. 194 . . . . .	451
Pope, <i>Christ Church v.</i> , 8 Gray 140 . . . . .	454
Porter, <i>People v.</i> , 6 Cal. 26 . . . . .	685
Porter, <i>State v.</i> , 4 Harrington 556 . . . . .	193, 196
Potts, <i>Rail v.</i> , 8 Humph. 225 . . . . .	193
Powell <i>v.</i> Milbank, 1 T. R. 399 n. . . . .	610
Powell <i>v.</i> Milbank, 2 W. Bl. 851 . . . . .	411
Powers <i>v.</i> Reed, 19 Ohio St. R. 189 . . . . .	383, 502, 556
Pratt <i>v.</i> Hull, 13 Johns. 334 . . . . .	428
Preston, <i>Trigg v.</i> , 1 Cong. Elect. Cas. 78 . . . . .	604
Price <i>v.</i> Barber, 13 Leg. Int. 140 . . . . .	106
Purviance, <i>McFarland v.</i> , 1 Cong. Elect. Cas. 131 . . . . .	441
Putnam <i>v.</i> Johnson, 10 Mass. 488 . . . . .	113, 471
Pyle, <i>Territory v.</i> , 1 Oregon 149 . . . . .	319
Quackenbush, <i>Morgan v.</i> , 22 Barb. 77 . . . . .	305
Quin, <i>United States v.</i> , 3 Am. L. T. Rep. 180 . . . . .	64, 592, 710
Rabaud <i>v.</i> D'Wolf, 1 Paine 587 . . . . .	479
Rail <i>v.</i> Potts, 8 Humph. 225 . . . . .	193
Railroad, <i>Mott v.</i> , 30 Penn. St. R. 9 . . . . .	636
Railroad Co., <i>Commonwealth v.</i> , 20 Penn. St. R. 518 . . . . .	146
Railroad Co., <i>Levering v.</i> , 8 W. & S. 463 . . . . .	546
Ramsay <i>v.</i> Callaway, 15 La. An. 464 . . . . .	313
Randall, <i>Jones v.</i> , Cowp. 37 . . . . .	733, 735
Randles, <i>State v.</i> , 7 Humph. 9 . . . . .	711
Ray, <i>Beal v.</i> , 17 Ind. 554 . . . . .	685
Ray, <i>Respublica v.</i> , 3 Yeates 66 . . . . .	281, 376, 616
Raymond, <i>People v.</i> , 37 N. Y. 428 . . . . .	694
Read, <i>Commonwealth v.</i> , 2 Ash. 261 . . . . .	126, 151
Reed <i>v.</i> Bank of Newburgh, 6 Paige 337 . . . . .	285
Reed, <i>Commonwealth v.</i> , 18 Pitts. L. J. 131 . . . . .	630, 663
Reed <i>v.</i> Cosden, 1 Cong. Elect. Cas. 353 . . . . .	413
Reed <i>v.</i> Kneass, 2 Pars. 584; 1 Phila. 162 . . . . .	366, 377, 414, 416
Reed, <i>Powers v.</i> , 19 Ohio St. R. 189 . . . . .	383, 502, 556
Reese, <i>Sinks v.</i> , 19 Ohio St. R. 306 . . . . .	114, 384, 493

## TABLE OF CASES.

xxxvii

	PAGE
<i>Regina v. Benton</i> , 9 Dowl. 1021 . . . . .	341
<i>Regina v. Bradley</i> , 3 Ellis & Ellis 634 . . . . .	267
<i>Regina v. Burnaby</i> , 2 Ld. Raym. 900 . . . . .	717
<i>Regina v. Coaks</i> , 28 Eng. L. & Eq. 304; 7 Q. B. 406 . . . . .	151
<i>Regina v. Guardians</i> , 5 Eng. L. & Eq. 361 . . . . .	133, 299
<i>Regina v. Harland</i> , 8 Dowl. 323 . . . . .	341
<i>Regina v. Hiorns</i> , 7 Ad. & Ellis 960; 3 N. & P. 184 . . . . .	147
<i>Regina v. Kendrick</i> , 5 Ad. & Ellis 49 . . . . .	551
<i>Regina v. Parker</i> , 3 Ad. & Ellis 292 . . . . .	719
<i>Reichly v. Maclay</i> , 2 W. & S. 59 . . . . .	736
<i>Reily, Huber v.</i> , 53 Penn. St. R. 112 . . . . .	43, 45, 49, 69, 543
<i>Rems, Hulseman v.</i> , 41 Penn. St. R. 396 . . . . .	236, 314, 454, 623, 654, 663
<i>Renick, State v.</i> , 37 Mo. 270 . . . . .	299
<i>Rennard, Moran v.</i> , 3 Brewst. 601 . . . . .	193
<i>Rennet, Green v.</i> , 1 T. R. 782 . . . . .	345
<i>Respublica v. Cleaver</i> , 4 Yeates 69 . . . . .	549
<i>Respublica v. Dallas</i> , 3 Yeates 314 . . . . .	689
<i>Respublica v. Gibbs</i> , 3 Yeates 429 . . . . .	48, 97
<i>Respublica v. McClean</i> , 4 Yeates 399 . . . . .	521
<i>Respublica v. Ray</i> , 3 Yeates 66 . . . . .	281, 376, 616
<i>Rex v. Bankes</i> , 3 Burr. 1454 . . . . .	584
<i>Rex v. Barzey</i> , 4 M. & S. 253 . . . . .	340, 341, 342
<i>Rex v. Blissell, Heywood</i> 360 . . . . .	151
<i>Rex v. Bridge</i> , 1 M. & S. 76 . . . . .	147, 151
<i>Rex v. Cambridge</i> , 3 Burr. 1647 . . . . .	394, 397
<i>Rex v. Coe, Heywood</i> 361 . . . . .	151
<i>Rex v. Dawes</i> , 4 Burr. 2022 . . . . .	145
<i>Rex v. Foxcroft</i> , 2 Burr. 1017 . . . . .	129, 133
<i>Rex v. Francis</i> , 2 Ad. & Ellis 49 . . . . .	340
<i>Rex v. Godwin</i> , 1 Dougl. 382 . . . . .	149
<i>Rex v. Hamilton</i> , 7 C. & P. 448 . . . . .	551
<i>Rex v. Hawkins</i> , 10 East 211 . . . . .	148, 151, 411, 414
<i>Rex v. Hill</i> , 2 Ld. Raym. 1415 . . . . .	709
<i>Rex v. Holland</i> , 4 T. R. 457 . . . . .	346
<i>Rex v. Jarvis</i> , 1 Burr. 148 . . . . .	709
<i>Rex v. Loxdale</i> , 1 Burr. 447 . . . . .	77, 529
<i>Rex v. Mallinson</i> , 2 Burr. 679 . . . . .	716
<i>Rex v. Monday, Cowp.</i> 530 . . . . .	148, 151
<i>Rex v. Parry</i> , 14 East 549 . . . . .	148, 151
<i>Rex v. Parry</i> , 6 Ad. & Ellis 810; 2 N. & P. 414 . . . . .	145
<i>Rex v. Philips</i> , 2 Stra. 921 . . . . .	724
<i>Rex v. Pitt</i> , 3 Burr. 1335 . . . . .	140
<i>Rex v. Pole</i> , 7 Mod. 194 . . . . .	451
<i>Rex v. Rogers</i> , 2 Campb. 654 . . . . .	412
<i>Rex v. Sargent</i> , 5 T. R. 466 . . . . .	145
<i>Rex v. Smithson</i> , 4 B. & Ad. 861 . . . . .	341

	PAGE
Rex v. Sparrow, 2 Stra. 1123 . . . . .	529
Rex v. Twynning, 2 B. & Ald. 386 . . . . .	412, 413
Rex v. Wardroper, 4 Burr. 1964 . . . . .	145
Rex v. Weston, 1 Stra. 623 . . . . .	724
Rex v. Wheatman, 1 Dougl. 331 . . . . .	709
Rex v. Wilkes, 4 Burr. 2527 . . . . .	346
Rex v. Wilkes, 2 Wils. 151 . . . . .	280
Rex v. Withers, Cowp. 537; 2 Burr. 1020 . . . . .	133
Reynolds, Cannon v., 5 Ellis & Bl. 301 . . . . .	568
Reynolds, Castle v., 10 Watts 52 . . . . .	566
Reynolds, Jennings v., 4 Kansas 110 . . . . .	736, 737
Reynolds v. McKinney, 4 Kansas 94 . . . . .	736, 737
Reynolds, People v., 5 Gilman 1 . . . . .	26
Rhoads v. Commonwealth, 15 Penn. St. R. 277 . . . . .	544, 569, 693
Rice v. Foster, 4 Harrington 479 . . . . .	3, 212
Rich v. Rich, 16 Wend. 676 . . . . .	429, 430
Richards, Hunt v., 4 Kansas 549 . . . . .	113
Richardson v. Stewart, 4 Binn. 198 . . . . .	421
Ridgeley, Blair v., 41 Mo. 63 . . . . .	83
Ridley v. Sherbrook, 3 Cold. 569 . . . . .	43, 82, 83
Riker, Bunn v., 4 Johns. 426 . . . . .	734, 735
Riley, People v., 15 Cal. 48 . . . . .	113
Risewick v. Davis, 19 Md. 82 . . . . .	470
Ritt, State v., 16 Am. L. Reg. 88 . . . . .	451
Robb, State v., 17 Ind. 536 . . . . .	193
Robbins v. Bellas, 4 Watts 255 . . . . .	508
Robbins, Peavey v., 3 Jones (Law) 339 . . . . .	193
Robinson, Catlin v., 2 Watts 379 . . . . .	567
Robinson, State v., 1 Kansas 17 . . . . .	677
Rodman, State v., 43 Mo. 256 . . . . .	306
Roe, People v., 1 Hill 470 . . . . .	427
Rogers, Rex v., 2 Campb. 654 . . . . .	412
Roll, State v., 7 West. L. J. 138 . . . . .	195
Roosevelt v. Kellogg, 20 Johns. 208 . . . . .	470
Root v. Adams, 1 Cong. Elect. Cas. 271 . . . . .	268
Rosborough, People v., 14 Cal. 180 . . . . .	667, 685
Rosseau, Petit v., 15 La. 239 . . . . .	608, 611
Rossett v. Hartley, 7 Ad. & Ellis 552 . . . . .	340
Rucker, Miller v., 1 Bush 135 . . . . .	193
Rudd v. Davis, 3 Hill 287; 7 Hill 529 . . . . .	428, 430
Runk, Farlee v., 2 Cong. Elect. Cas. 87 . . . . .	113
Rupp, Commonwealth v., 9 Watts 721 . . . . .	721
Russell, Johnston v., 37 Cal. 670 . . . . .	736
Rutherford, Calder v., 3 Brod. & Bing. 302 . . . . .	412
Rutherford, Fisher v., Bald. 193 . . . . .	339
Rutledge, State v., 8 Humph. 32 . . . . .	616
Rutter, Turnpike Co. v., 4 S. & R. 6 . . . . .	545

## TABLE OF CASES.

xxxix

	PAGE
Salter v. County of Philadelphia, 1 Phila. 255 . . . . .	590
Sargent, Rex v., 5 T. R. 466 . . . . .	145
Saunders v. Haynes, 13 Cal. 145 . . . . .	150
Savadge, Davy v., Hob. 87 . . . . .	200
Saxton, People v., 22 N. Y. 309 . . . . .	264, 376
Scarff, Foster v., 15 Ohio St. R. 535 . . . . .	128, 258, 679
Schemerhorn, People v., 19 Barb. 540 . . . . .	448
Schenck v. Peay . . . . .	678
School Controllers, Case of, 6 Phila. 110 . . . . .	669
School Directors, Williams v., Wright 578 . . . . .	50
Schuman v. Schuman, 6 Phila. 318 . . . . .	544, 693
Schuykill Navigation Co. v. Loose, 19 Penn. St. R. 18 . . . . .	543, 546
Scott v. Duffy, 14 Penn. St. R. 18 . . . . .	736
Scott, Easton v., 1 Cong. Elect. Cas. 272 . . . . .	376
Scoville v. Canfield, 14 Johns. 338 . . . . .	76
Scranton Borough Election, 1 Luz. Leg. Obs. 12 . . . . .	356, 450, 455
Seaman, People v., 5 Denio 409 . . . . .	267, 390, 401
Searcy v. Grow, 15 Cal. 117 . . . . .	491
Sedam v. Shaffer, 5 W. & S. 529 . . . . .	554
Seitz v. Buffum, 14 Penn. St. R. 69 . . . . .	554
Settler of Accounts of Passyunk, Case of . . . . .	521
Sexton, Howard v., 1 Denio 440 . . . . .	443
Shaffer, Sedam v., 5 W. & S. 529 . . . . .	554
Shaftsbury Case, 3 Dougl. Elect. Cas. 150 . . . . .	395
Sharp, Kerr v., 14 S. & R. 399 . . . . .	554
Sharpe, Colden v., 1 Cong. Elect. Cas. 369 . . . . .	268
Shaver, Commonwealth v., 3 W. & S. 338 . . . . .	134
Shaw, Commonwealth v., 7 Met. 52 . . . . .	710, 711
Sheeley, State v., 15 Iowa 404 . . . . .	711
Sheetz's Case . . . . .	355, 514, 556
Shepherd, Oates v., 2 Stra. 1272 . . . . .	345
Sheppard, Gibbons v., 2 Brewst. 1, 3, 130 . . . . .	50, 106, 335, 450, 453, 492, 493, 502, 526, 558, 623.
Sheppard, Gibbons v., 65 Penn. St. R. 20, 35, 44 . . . . .	256, 257, 335, 336, 349, 467, 538, 693.
Sherban, Commonwealth v., 8 Watts 212 . . . . .	551, 737
Sherbrook, Ridley v., 3 Cold. 569 . . . . .	43, 82, 83
Sheriff, Commonwealth v., 16 S. & R. 304 . . . . .	547
Sheriff, Commonwealth v., 1 Brewst. 183 . . . . .	105, 193
Sherwood, State v., 15 Minn. 221 . . . . .	319
Shields, Howard v., 16 Ohio St. R. 184 . . . . .	336, 378, 454
Shippen, Baring v., 2 Binn. 165 . . . . .	138
Shirley v. Howard, 3 Chicago Leg. News 230 . . . . .	737
Simpson, Bailey v., Binns's Just. 498 n. . . . .	281
Simpson, Stuart v., 1 Wend. 376 . . . . .	428
Sinks v. Reese, 19 Ohio St. R. 306 . . . . .	114, 384, 493

	PAGE
Skerrett's Case, 2 Pars. 509 . . . . .	320, 353, 453
Slack v. Maysville and Lexington Railroad Co., 13 B. Mon. 1 . . . . .	26
Slicer v. Bank of Pittsburgh, 16 How. 571 . . . . .	549
Small, Commonwealth v., 26 Penn. St. R. 31 . . . . .	149, 557, 630
Small, State v., 1 Fairf. 109 . . . . .	195
Smith, Boren v., 1 Chicago Leg. News 170 . . . . .	64
Smith v. Bowen, 11 Mod. 230 . . . . .	345
Smith, Catlin v., 2 S. & R. 267 . . . . .	114, 221
Smith v. City of Janesville, 3 Chicago Leg. News 227 . . . . .	26
Smith, Commonwealth v., 45 Penn. St. R. 59 . . . . .	274, 467
Smith, Dishon v., 10 Iowa 212 . . . . .	306, 450, 684
Smith v. McCarthy, 56 Penn. St. R. 359 . . . . .	26, 623
Smith, People v., 51 Ill. 177 . . . . .	467, 557
Smith, State v., 18 N. H. 91 . . . . .	193
Smith, State v., 14 Wis. 497 . . . . .	150
Smith, Wilcox v., 5 Wend. 231 . . . . .	443
Smith, Willoughby v., 1 Cong. Elect. Cas. 265 . . . . .	268
Smithson, Rex v., 4 B. & Ad. 861 . . . . .	341
Smyth v. McMasters, 2 P. A. Browne 182 . . . . .	734, 736
Smyth, People v., 28 Cal. 21 . . . . .	608, 611
Snowden, Commonwealth v., 1 Brewst. 218 . . . . .	104
Snyder v. Andrews, 6 Barb. 48 . . . . .	429
Snyder, Wagon seller v., 7 Watts 343 . . . . .	736
Somerville v. Somerville, 5 Ves. Jr. 750 . . . . .	474
Souders, United States v., 2 Abbott U. S. Rep. 456 . . . . .	384, 616
South Whitehall, North Whitehall v., 3 S. & R. 121 . . . . .	521
Souzer, Demeyer v., 6 Wend. 436 . . . . .	428
Spackman v. Byers, 6 S. & R. 385 . . . . .	569
Sparrow, Rex v., 2 Stra. 1123 . . . . .	529
Spear v. Myers, 6 Barb. 445 . . . . .	431
Spiese v. McCoy, 6 W. & S. 485 . . . . .	736
Spragins v. Houghton, 3 Ill. 377 . . . . .	49, 152
Sprague v. Norway, 31 Cal. 173 . . . . .	450, 452
Springer, Morrison v., 15 Iowa 304, 345 . . . . .	49, 237
Springer, Mytinger v., 3 W. & S. 405 . . . . .	736
Squires v. Whisken, 3 Campb. 140 . . . . .	732
Stanton v. Lane, 2 Cong. Elect. Cas. 637 . . . . .	655
Starling v. Turner, 2 Lev. 50; 1 Vent. 206 . . . . .	279
State v. Adams, 2 Stew. 231, 239 . . . . . 51, 244, 286, 383, 589, 664	
State v. Albin, 44 Mo. 346 . . . . .	64
State v. Anderson, Coxe 318 . . . . .	150
State v. Bailey, 8 Shep. 62 . . . . .	711
State v. Benedict, 15 Minn. 199 . . . . .	677
State v. Bernoudy, 36 Mo. 279 . . . . .	302
State v. Binder, 38 Mo. 450 . . . . .	133
State v. Boal, 46 Mo. 528 . . . . .	150, 664



## TABLE OF CASES.

xli

	PAGE
State v. Bond, 38 Mo. 425 . . . . .	64
State v. Boyett, 10 Ired. 336 . . . . .	704
State, Byrne v., 12 Wis. 519 . . . . .	195
State v. Cavers, 22 Iowa 343 . . . . .	306
State v. Churchill, 15 Minn. 455 . . . . .	319
State v. Clerk of Passaic Co., 1 Dutch. 354 . . . . .	320
State v. Cobb, 2 Kansas 32 . . . . .	677
State v. Cohoon, 12 Ired. 178 . . . . .	704
State v. Conrades, 45 Mo. 45 . . . . .	669
State v. Cook, 41 Mo. 593 . . . . .	64
State v. Daniels, 44 N. H. 383 . . . . .	193, 470
State, Davis v., 7 Md. 161 . . . . .	40
State v. Douglass, 7 Clarke 413 . . . . .	710, 711
State, Douglass v., 31 Ind. 479 . . . . .	611
State v. Ellwood, 12 Wis. 552 . . . . .	266
State v. Fitzpatrick, 4 Rhode Island 269 . . . . .	710
State v. Frest, 4 Harrington 558 . . . . .	113
State, Geebrick v., 5 Iowa 491 . . . . .	26
State v. Giles, 1 Chand. 112 . . . . .	150
State v. Glover, 41 Mo. 339 . . . . .	87, 97
State v. Goetze, 22 Wis. 363 . . . . .	684
State v. Goldthwaite, 16 Wis. 146 . . . . .	266
State, Gray v., 4 Ohio 353 . . . . .	50
State, Gray v., 2 Harrington 76 . . . . .	16, 19
State v. Harker, 4 Harrington 559 . . . . .	616
State v. Harrison, 38 Mo. 540 . . . . .	306
State v. Hart, 6 Jones (Law) 389 . . . . .	703
State v. Hascall, 6 N. H. 352 . . . . .	443
State v. Heighland, 41 Mo. 388 . . . . .	87, 97
State v. Haynorth, 3 Sneed 64 . . . . .	711
State v. Hilmantel, 21 Wis. 566 . . . . .	64, 453
State v. Hilmantel, 23 Wis. 422 . . . . .	377, 384
State v. Howard County, 41 Mo. 247 . . . . .	581
State v. Jenkins, 43 Mo. 261 . . . . .	677
State v. Johnson, 17 Ark. 407 . . . . .	581
State v. Jones, 19 Ind. 356 . . . . .	306, 450, 684
State, Jones v., 1 Kansas 279 . . . . .	450
State v. Judge of Ninth Judicial Circuit, 13 Ala. 805 . . . . .	113, 267, 365, 370.
State v. Justices of Middlesex, Coxe 244 . . . . .	557
State v. Lehre, 7 Rich. 234 . . . . .	454
State v. McDonald, 4 Harrington 555 . . . . .	193, 195
State, McGuire v., 7 Humph. 54 . . . . .	703
State v. Macomber, 7 Rhode Island 349 . . . . .	703
State, Maddox v., 32 Ind. 111 . . . . .	479
State v. Marlow, 15 Ohio St. R. 114 . . . . .	663

	PAGE
State <i>v.</i> Marshall, 45 N. H. 281 . . . . .	711
State, Mayor and Common Council of Baltimore <i>v.</i> , 15 Md. 459 . . . . .	41
State <i>v.</i> Messmore, 14 Wis. 115 . . . . .	302
State <i>v.</i> Minnick, 15 Iowa 123 . . . . .	711
State <i>v.</i> Moore, 3 Dutch. 105 . . . . .	705
State, Morris <i>v.</i> , 7 Blackf. 607 . . . . .	704
State <i>v.</i> Noyes, 10 Fost. 279 . . . . .	26
State <i>v.</i> Olin, 23 Wis. 309 . . . . .	377, 413
State <i>v.</i> O'Neill, 24 Wis. 149 . . . . .	26
State <i>v.</i> Orvis, 20 Wis. 235 . . . . .	684
State, Pearce <i>v.</i> , 1 Sneed 637 . . . . .	710
State <i>v.</i> Porter, 4 Harrington 556 . . . . .	193, 196
State <i>v.</i> Randles, 7 Humph. 9 . . . . .	711
State <i>v.</i> Renick, 37 Mo. 270 . . . . .	299
State <i>v.</i> Ritt, 16 Am. L. Reg. 88 . . . . .	451
State <i>v.</i> Robb, 17 Ind. 536 . . . . .	193
State <i>v.</i> Robinson, 1 Kansas 17 . . . . .	677
State <i>v.</i> Rodman, 43 Mo. 256 . . . . .	306
State <i>v.</i> Roll, 7 West. L. J. 138 . . . . .	195
State <i>v.</i> Rutledge, 8 Humph. 32 . . . . .	616
State <i>v.</i> Sheeley, 15 Iowa 404 . . . . .	711
State <i>v.</i> Sherwood, 15 Minn. 221 . . . . .	319
State <i>v.</i> Small, 1 Fairf. 109 . . . . .	195
State <i>v.</i> Smith, 18 N. H. 91 . . . . .	193
State <i>v.</i> Smith, 14 Wis. 497 . . . . .	150
State <i>v.</i> Staten, 6 Cold. 233 . . . . .	35, 43, 196
State <i>v.</i> Steers, 44 Mo. 223 . . . . .	300
State, Steinwehr <i>v.</i> , 5 Sneed 586 . . . . .	704
State <i>v.</i> Stumpf, 21 Wis. 579 . . . . .	452
State <i>v.</i> Stumpf, 23 Wis. 630 . . . . .	64, 453
State <i>v.</i> Symonds, 57 Maine 148 . . . . .	81
State <i>v.</i> Taylor, 15 Ohio St. R. 137 . . . . .	677, 679
State <i>v.</i> The Governor, 1 Dutch. 331, 348 . . . . .	305, 319
State <i>v.</i> Tierney, 23 Wis. 430 . . . . .	267
State <i>v.</i> Tudor, 5 Day 329 . . . . .	283, 284
State <i>v.</i> Tweed, 3 Dutch. 111 . . . . .	710
State <i>v.</i> Warren, 1 Houst. 39 . . . . .	313, 320
State <i>v.</i> Williams, 25 Maine 561 . . . . .	704
State <i>v.</i> Woodson, 41 Mo. 227 . . . . .	97
Staten, State <i>v.</i> , 6 Cold. 233 . . . . .	35, 43, 196
Stearns, Blanchard <i>v.</i> , 5 Met. 298 . . . . .	194, 195
Steel <i>v.</i> Martin, 5 West. Jur. 33 . . . . .	336
Steele <i>v.</i> Steele, 4 Dall. 409 . . . . .	551
Steers, State <i>v.</i> , 44 Mo. 223 . . . . .	300
Steiner <i>v.</i> Coxe, 4 Penn. St. R. 13 . . . . .	508
Steinwehr <i>v.</i> State, 5 Sneed 586 . . . . .	704

## TABLE OF CASES.

xliii

	PAGE
Stephens v. Cowan, 6 Watts 513 . . . . .	566
Stevens, People v., 5 Hill 616 . . . . .	262, 264, 443
Stevenson v. Lawrence, 1 Brewst. 126, 131 . . . . .	515, 527
Steward v. Jefferson, 3 Harrington 335 . . . . .	16, 18
Stewart v. Commonwealth, 4 S. & R. 194 . . . . .	716
Stewart, Fitzgerald v., 53 Penn. St. R. 343 . . . . .	549
Stewart v. Foster, 2 Binn. 110 . . . . .	189, 457
Stewart v. Hayes, 3 Chicago Leg. News 117 . . . . .	151
Stewart, Richardson v., 4 Binn. 198 . . . . .	421
Stockton's Case, Cong. Globe, 1865-6, p. 1635 . . . . .	212
Stoever v. Stoever, 9 S. & R. 454 . . . . .	554
Stone, Fury v., 2 Dall. 184 . . . . .	569
Stone, Hyde v., 9 Cow. 230 . . . . .	430
Strauss, Sudbury v., 21 Pick. 148 . . . . .	454
Street v. Commonwealth, 6 W. & S. 209 . . . . .	464, 539
Stryker v. Kelly, 7 Hill 9 . . . . .	442
Stuart v. Simpson, 1 Wend. 376 . . . . .	428
Stukely, Arris v., 2 Mod. 260 . . . . .	607, 610
Stumpf, State v., 21 Wis. 579 . . . . .	452
Stumpf, State v., 23 Wis. 630 . . . . .	64, 453
Sudbury v. Strauss, 21 Pick. 148 . . . . .	454
Supervisors of Sacramento County, Christy v., 39 Cal. 3 . . . . .	694
Sweeny v. Delany, 1 Penn. St. R. 320 . . . . .	339
Swift v. Chamberlain, 3 Conn. 537 . . . . .	277
Swift, Commonwealth v., 4 Whart. 186 . . . . .	671
Sykes, Gilbert v., 16 East 150 . . . . .	728, 730, 733
Symonds, State v., 57 Maine 148 . . . . .	81
Taft, Hendesty v., 23 Md. 512 . . . . .	64
Talbot v. Dent, 9 B. Mon. 526 . . . . .	26
Tanner v. King, 11 La. 175 . . . . .	474
Tappenden, Harman v., 1 East 555 . . . . .	190, 191
Tarlton v. Fisher, 2 Dougl. 646 . . . . .	279
Taylor v. Griswold, 2 Green 223 . . . . .	283, 284
Taylor, McMartin v., 2 Barb. 356 . . . . .	428
Taylor, State v., 15 Ohio St. R. 137 . . . . .	677, 679
Taylor v. Taylor, 10 Minn. 107 . . . . .	306, 336, 450
Ten Eyck, Hugunin v., 1 Cong. Elect. Cas. 501 . . . . .	268
Territory v. Pyle, 1 Oregon 149 . . . . .	319
Thacker v. Hawk, 11 Ohio 376 . . . . .	50
Thayer v. Greenbank, 1 Brewst. 189 . . . . .	502
Thompson, Blackwell v., 2 Stew. & Port. 348 . . . . .	704
Thompson v. Circuit Judge of Mobile, 9 Ala. 338 . . . . .	306
Thompson v. Ewing, 1 Brewst. 67, 102-3 . . . . .	50, 111, 124, 229, 236, 237, 251, 273, 277, 281, 305, 334, 349, 359, 360, 365, 415, 449, 452, 453, 467, 501, 515, 566, 581.

	PAGE
Thompson, Ewing <i>v.</i> , 43 Penn. St. R. 377 . . . . .	565, 573, 611
Thompson, Miller <i>v.</i> , 2 Cong. Elect. Cas. 118 . . . . .	118
Tieman, People <i>v.</i> , 30 Barb. 193 . . . . .	608, 611
Tierney, State <i>v.</i> , 23 Wis. 430 . . . . .	267
Tioga <i>v.</i> Lawrence, 2 Watts 43 . . . . .	544
Tisdale, People <i>v.</i> , 1 Dougl. 59 . . . . .	267, 384
Tomb, Cambria Iron Co. <i>v.</i> , 48 Penn. St. R. 388 . . . . .	548
Town of Fairbury, People <i>v.</i> , 51 Ill. 149 . . . . .	631
Tranah, Freeman <i>v.</i> , 12 C. B. 413 . . . . .	567
Trego, Kerr <i>v.</i> , 47 Penn. St. R. 292 . . . . .	319, 623, 630, 632
Trigg <i>v.</i> Preston, 1 Cong. Elect. Cas. 78 . . . . .	604
Trumbull's Case, 2 Cong. Elect. Cas. 618 . . . . .	51
Trustees of Erie <i>v.</i> Erie, 31 Penn. St. R. 515 . . . . .	508
Tudor, State <i>v.</i> , 5 Day 329 . . . . .	283, 284
Turner <i>v.</i> Baylies, 1 Cong. Elect. Cas. 234 . . . . .	268
Turner, Starling <i>v.</i> , 2 Lev. 50; 1 Vent. 206 . . . . .	279
Turney <i>v.</i> Marshall, 2 Cong. Elect. Cas. 167 . . . . .	51
Turnpike Co., People <i>v.</i> , 23 Wend. 228 . . . . .	401
Turnpike Co. <i>v.</i> Rutter, 4 S. & R. 6 . . . . .	554
Tuthill, People <i>v.</i> , 31 N. Y. 550 . . . . .	454
Tweed, State <i>v.</i> , 3 Dutch. 111 . . . . .	710
Twynning, Rex <i>v.</i> , 2 B. & Ald. 386 . . . . .	412, 413
Udny <i>v.</i> Udny, L. R. 1 H. L. Sc. 441 . . . . .	479
United States <i>v.</i> Addison, 6 Wall. 291 . . . . .	611
United States <i>v.</i> Almeida, Whart. Prec. § 1061 . . . . .	716
United States <i>v.</i> Amedy, 11 Wheat. 408 . . . . .	485
United States, Buckwalter <i>v.</i> , 11 S. & R. 193 . . . . .	76
United States <i>v.</i> Ballard, 13 Int. R. Rec. 195 . . . . .	710
United States <i>v.</i> Furlong, 5 Wheat. 184 . . . . .	723
United States <i>v.</i> Gillis, 2 Cranch C. C. 44 . . . . .	193
United States <i>v.</i> Murphy, 16 Pet. 203 . . . . .	374
United States <i>v.</i> Quinn, 3 Am. L. T. Rep. 180 . . . . .	64, 592, 710
United States <i>v.</i> Souders, 2 Abbott U. S. Rep. 456 . . . . .	384, 616
United States, The Aurora <i>v.</i> , 7 Cranch 382 . . . . .	16
United States <i>v.</i> The Penelope, 2 Pet. Ad. 450 . . . . .	247, 470, 474
United States <i>v.</i> Wilson, Bald. 78 . . . . .	374
Usher <i>v.</i> Dansey, 4 M. & S. 94 . . . . .	568
Utica Insurance Co., Attorney-General <i>v.</i> , 2 Johns. Ch. 389 . . . . .	622
Vail, People <i>v.</i> , 20 Wend. 12 . . . . .	262, 265, 305, 313, 382, 383, 390, 405, 437
Vallandigham <i>v.</i> Campbell, 41 Cong. Globe 2317 . . . . .	387
Van Cleve, People <i>v.</i> , 1 Mich. 362 . . . . .	306
Vandever, Byington <i>v.</i> , 2 Cong. Elect. Cas. 395 . . . . .	655
Van Ness's Case, 1 Cong. Elect. Cas. 122 . . . . .	655

## TABLE OF CASES.

xlv

	PAGE
Van Slyck, <i>People v.</i> , 4 Cow. 297, 322 . . . . .	262, 265, 302, 382, 390, 393, 396, 436.
Van Steenberg <i>v.</i> Kortz, 10 Johns. 167 . . . . .	443
Van Thiennen, <i>Faggot v.</i> , Cas. Pr. C. P. 75 . . . . .	345
Vischer <i>v.</i> Yates, 11 Johns. 23 . . . . .	734, 735
Wagonseller <i>v.</i> Snyder, 7 Watts 343 . . . . .	736
Waldron, <i>Jenkins v.</i> , 11 Johns. 114 . . . . .	190, 279, 401
Walker, <i>Jackson v.</i> , 5 Hill 27 . . . . .	612
Walkhouse <i>v.</i> Derwent, 1 W. Bl. 19 . . . . .	729
Wallace, <i>Commonwealth v.</i> , Thach. Cr. Cas. 592 . . . . .	703
Wallington <i>v.</i> Kneass, 15 Penn. St. R. 313 . . . . .	556
Walton, <i>Auld v.</i> , 12 La. An. 129 . . . . .	64
Walton, <i>Ex parte</i> , 2 Whart. 501 . . . . .	547
Ward, <i>Kilham v.</i> , 2 Mass. 236 . . . . .	36, 53
Wardroper, <i>Rex v.</i> , 4 Burr. 1694 . . . . .	145
Warren, <i>State v.</i> , 1 Houst. 39 . . . . .	313, 320
Watt, <i>Diamond v.</i> , Leg. Doc. 1870, p. 1061 . . . . .	335
Weaver <i>v.</i> Given, 1 Brewst. 140 . . . . .	237, 335, 355, 359, 415, 449, 492, 501
Weckerly <i>v.</i> Geyer, 11 S. & R. 35 . . . . .	192
Weddell, <i>Peck v.</i> , 17 Ohio St. R. 271 . . . . .	623, 663
Weeks <i>v.</i> Ellis, 2 Barb. 320 . . . . .	438, 443
Weigley <i>v.</i> Weir, 7 S. & R. 310 . . . . .	554
Weir, <i>Weigley v.</i> , 7 S. & R. 310 . . . . .	554
Weller, <i>People v.</i> , 11 Cal. 49 . . . . .	685
Western, <i>Rex v.</i> , 1 Stra. 623 . . . . .	724
West Philadelphia, <i>Borough of</i> , 5 W. & S. 281, 283 . . . . .	24, 457
Wheatman, <i>Rex v.</i> , 1 Dougl. 331 . . . . .	709
White, <i>Ashby v.</i> , 2 Ld. Raym. 938; 1 Bro. P. C. 45 . . . . .	34, 90, 190, 191, 193, 279, 400.
White <i>v.</i> Brown, 1 Wall. Jr. 217 . . . . .	470
White, <i>People v.</i> , 24 Wend. 525 . . . . .	443
Whisken, <i>Squires v.</i> , 3 Campb. 140 . . . . .	732
Whiting, <i>Williams v.</i> , 11 Mass. 424 . . . . .	107
Wickham, <i>Philips v.</i> , 1 Paige 590, 598 . . . . .	283, 447
Wiggins, <i>Ex parte</i> , 1 Bank. Reg. 90 . . . . .	479
Wilcox <i>v.</i> Magruder, 7 West. L. J. 507 . . . . .	452
Wilcox <i>v.</i> Smith, 5 Wend. 231 . . . . .	443
Wilkes, <i>Rex v.</i> , 4 Burr. 2527 . . . . .	346
Wilkes, <i>Rex v.</i> , 2 Wils. 151 . . . . .	280
Williams <i>v.</i> Bowers, 1 Cong. Elect. Cas. 263 . . . . .	268
Williams <i>v.</i> East India Co., 3 East 192 . . . . .	411, 413
Williams <i>v.</i> School Directors, <i>Wright</i> 578 . . . . .	50
Williams, <i>State v.</i> , 25 Maine 561 . . . . .	704
Williams <i>v.</i> Whiting, 11 Mass. 424 . . . . .	107
Williams, <i>Wilson v.</i> , 14 Wend. 146 . . . . .	428

	PAGE
Williamson's Case, 26 Penn. St. R. 9 . . . . .	530
Williamson v. Lewis, 39 Penn. St. R. 9 . . . . .	530
Willoughby v. Smith, 1 Cong. Elect. Cas. 265 . . . . .	268
Wilson, Adams v., 1 Cong. Elect. Cas. 373 . . . . .	413
Wilson, Crawford v., 4 Barb. 504 . . . . .	429, 430
Wilson, Elbin v., 33 Md. 135 . . . . .	195, 422
Wilson, Johnston v., 2 N. H. 202 . . . . .	678
Wilson, United States v., Bald. 78 . . . . .	374
Wilson v. Williams, 14 Wend. 146 . . . . .	428
Wing, Biddle v., 1 Cong. Elect. Cas. 504 . . . . .	113
Withers, Rex v., Cowp. 537; 2 Burr. 1020 . . . . .	133
Woelper, Commonwealth v., 3 S. & R. 29, 43 . . . . .	201, 213, 266
Wolbert's Case . . . . .	368
Wood, Caster v., Bald. 289 . . . . .	339
Wood, Howard v., 2 Lev. 245; 2 Jon. 126 . . . . .	610
Woodruff, McNeely v., 1 Green 352 . . . . .	454
Woods v. Ingersoll, 1 Binn. 146 . . . . .	508
Woodson, State v., 41 Mo. 227 . . . . .	97
Wooldridge, Adams v., 4 Ill. 255 . . . . .	737
Wootan, Hasket v., 1 N. & M. 180 . . . . .	735
Worcester Case, 3 Dougl. Elect. Cas. 129 . . . . .	395
Wright v. Fisher, 1 Cong. Elect. Cas. 518 . . . . .	268
Wright, Pickwood v., 1 H. Bl. 643 . . . . .	569
Yates, Vischer v., 11 Johns. 23 . . . . .	734, 735
Yeates, Knowles v., 31 Cal. 82 . . . . .	257, 451, 502
York County, Bacon v., 26 Maine 491 . . . . .	306
York County Election, Journ. Assembly 310-15 . . . . .	97
Young, Jackson v., 5 Cow. 269 . . . . .	442
Zell's Case, 2 Cong. Elect. Cas. 92 . . . . .	655
Zephon's Case, 8 W. & S. 382 . . . . .	232

LEADING CASES  
ON THE  
LAW OF ELECTIONS.





# ELECTION CASES.

---

## RICE v. FOSTER.

In the Court of Errors and Appeals of Delaware.

JUNE TERM 1847.

(REPORTED 4 HARRINGTON 479.)

[ *What questions may be submitted to a popular vote.* ]

The people have no legislative power in their primary assemblies ; they have divested themselves of it by the constitution, and can only resume it in the forms therein prescribed, or by revolution.

The general assembly cannot delegate the power of making laws to the people at large ; nor can they make it to depend on the assent or approval of any other body.

Case Stated. This was an action of debt upon a lease from Edward L. Rice to John Foster, of a tavern-house in Wilmington, at a yearly rent of \$700, with a proviso that the rent should be only \$500, "if, by the law of this state, the court of general sessions have not, at the May Term 1847, any lawful authority to recommend to the governor, any person to keep a public-house or tavern for the sale of intoxicating liquors, within the county of New Castle." One quarter's rent was due, by the terms of the lease, on the 8th of May 1847 ; the defendant paid \$125, and refused to pay any more ; and this suit was brought for the residue. The substance of the act of 1847, the validity of which was the question in the cause, is stated in the opinion of the court.

*J. A. Bayard, Wales and Clayton*, for the plaintiff.

*Smithers, Bradford and Layton*, for the defendant.

(What questions may be submitted to a popular vote.)

BOOTH, C. J. The question arising upon the statement of facts submitted to the court is, whether the judges of the court of general sessions of the peace and gaol delivery have any lawful authority to recommend to the governor of the state, any person or persons to keep an inn, tavern or public house of entertainment, for the sale of intoxicating liquors, within the county of New Castle. At a very early period of our colonial government, licenses to keep inns, taverns and public houses of entertainment, were granted by the governor, upon the recommendation of the judges of the court of general sessions of the peace and gaol delivery; spirituous and vinous liquors were retailed by virtue of this license, although not mentioned in its words. With a few slight modifications, the law on this subject has continued in force to the present time.

The legislature of this state, at their late session, passed an act, on the 19th day of February last, authorizing the people, in their several counties, on the first Tuesday of April 1847, to decide, by ballot, whether the retailing of intoxicating liquors should be permitted among them. If a majority of votes in any county, at such election, was for "no license," by the terms of the act, the retailing of intoxicating liquors is prohibited within such county; and the judges of the court of general sessions of the peace and gaol delivery have no lawful authority to recommend any person for a license to keep an inn, tavern or public house of entertainment; if a majority of votes was for "license," the law continues in force, and licenses are to be granted as heretofore. The question, then, depends on the validity of the act of the 19th of February 1847 (10 Vol. 178); and if valid, on the result of the popular vote in New Castle county, at the election held on the first Tuesday of April last.

Admitting, for the sake of the argument (but it is denied by a majority of this court), that the alleged returns are properly authenticated, and afford sufficient legal evidence that a majority of the votes in New Castle

(What questions may be submitted to a popular vote.)

county was against licensing the retailing of intoxicating liquors; then the important question which has been argued in this cause arises—whether the act of the 19th of February is unconstitutional.

The proposition that an act of the legislature is not unconstitutional, unless it contravenes some express provision of the constitution, is, in the opinion of the court, untenable. The nature and spirit of our republican form of government; the purpose for which the constitution was formed, which is, to protect life, liberty, reputation and property, and the right of all men to attain objects suitable to their condition without injury by one to another; to secure the impartial administration of justice; and generally, the peace, safety and happiness of society; have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass. An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning; and can have no more obligatory force, than when it opposes some express prohibition contained in that instrument. It is irrational, to maintain that such an act is a law, when it defeats the very object and intention of granting legislative power. Therefore, an act, such as that mentioned in the argument, to make a man a judge in his own cause, would not be valid; because it never was the intention of the constitution to vest such power in the legislature, the exercise of which violates the plainest principles of natural justice. So also, an act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government; of this character, it is contended, is the act of the legislature of the 19th of February 1847.

The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the constitution of

(What questions may be submitted to a popular vote.)

the United States, and of the first constitution of this state, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal, and indeed greater, dangers resulted from a pure democracy, than from an absolute monarchy: each leads to despotism. Wherever the power of making laws, which is the supreme power in a state, has been exercised directly by the people, under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control, or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society.

In every government founded on popular will, the people, although intending to do right, are the subjects of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker; the great aim and objects of civil government are prostrated, amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate it, by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party, acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of revolutionary France, in the days of her short-lived, misnamed republic, shocked the friends of rational liberty throughout the civilized world; there, in the midst of the most refined and polished nation of Europe, the guillotine dispensed with the forms of law, as unmeaning pageants; and under the capricious mandates of popular frenzy, running

(What questions may be submitted to a popular vote.)

wild in pursuit of the phantom of a false, licentious liberty, "suspicion filled their prisons, and massacre was their gaol delivery."\*

In the convention of 1787 which formed the constitution of the United States, the spirit of insubordination, and the tendency to a democracy, in many parts of our country, were viewed as unfavorable auguries in regard both to the adoption of the constitution and its perpetuity. The members most tenacious of republicanism were as loud as any in declaiming against the vices of democracy. Mr. Gerry of Massachusetts, the friend and associate of Mr. Jefferson, thought it "the worst of all political evils." The necessity of guarding against its tendencies, in order to obtain stability and permanence in our government, was acknowledged by all; even the propriety of electing, by an immediate vote of the people, the first branch of the national legislature, was seriously questioned by some of the ablest members and warmest advocates of a republican form of government. Mr. Sherman of Connecticut opposed it, on the ground that the people were constantly liable to be misled; and he insisted, that the election ought to be by the state legislatures. Mr. Gerry remarked, that "he did not like the election by the people;" he said, "the evils we experience flow from the excess of democracy; the people do not want virtue, but are the dupes of pretended patriots." Mr. Madison, although he considered "the popular election of one branch of the national legislature, as essential to every plan of free government, was an advocate for the policy of refining the popular appointments by successive filtrations." Mr. Edmund Randolph of Virginia observed, "that the object was, to provide a cure for the evils under which the United States

\* The reign of the Commune, in Paris, in the year 1871, exceeded, if possible, in atrocity, the excesses of the first revolution, and dwarfed the Reign of Terror almost into insignificance. A sad spectacle, indeed, of the abyss into which a highly civilized people may fall headlong, who have thrown aside the restraints of the Christian religion, and abandoned themselves to the pursuit of a false social theory!

(What questions may be submitted to a popular vote.)

labored; that in tracing these evils to their origin, every man found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for, against this tendency of our governments; and that a good senate seemed most likely to answer the purpose."

In the debates on the federal constitution in the Virginia convention, Mr. Madison, always the advocate of popular rights, subject to the wholesome restraints of law, remarked, "that turbulence, violence and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions; and that these, in republics, more frequently than any other cause, have produced despotism." "If," he observes, "we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes; if we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes may terminate here in the same fatal effects which they produced in those republics." To guard against these dangers, and the evil tendencies of a democracy, our republican government was instituted, by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them, by separate, co-ordinate branches of government, in whom these powers are vested by the constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy and misguided zeal; and to protect the minority against the injustice of the majority.

The constitution of the state of Delaware begins by asserting the great principles on which it is founded; and the aim and object of establishing our form of government. The first article contains a declaration of those inherent

(What questions may be submitted to a popular vote.)

rights which belong to every individual in society; of certain restrictions imposed on the legislative, executive and judicial power; and of the right of the citizens to meet together in an orderly manner, and to apply to persons entrusted with the powers of government, for redress of grievances, or other proper purposes, by petition, remonstrance and address. Most of the matters mentioned in the first article, are merely declaratory of the doctrines of the common law on the same subjects, formerly affirmed by Magna Charta in the year 1215, and afterwards asserted by the Bill of Rights in 1688, as the undoubted rights and liberties of the people of that country whence we have derived our language and literature, the Christian religion, and the common law. The same article of our constitution concludes with a declaration, in the name of the people, that everything contained in that article is reserved by them out of the general powers of government thereafter granted. All powers, therefore, not reserved, are surrendered by the people to those entrusted with the powers of government, to be exercised only in accordance with the principles and design of the constitution, and the genius of our republican system.

The legislative, executive and judicial powers compose the sovereign power of a state. The people of the state of Delaware have vested the legislative power in a general assembly, consisting of a senate and house of representatives; the supreme executive power of the state, in a governor; and the judicial power, in the several courts mentioned in the sixth article. The sovereign power, therefore, of this state resides with the legislative, executive and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it; to do so, would be an infraction of the constitution, and a dissolution of the government; nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance or address. They have the power to change or alter the constitution;

(What questions may be submitted to a popular vote.)

but this can be done only in the mode prescribed by the instrument itself; the attempt to do so, in any other mode, is revolutionary. And although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government.

It is equally clear, that neither the legislative, executive nor judicial departments, separately, nor all combined, can devolve on the people, the exercise of any part of the sovereign power with which each is invested. The assumption of a power to do so, would be usurpation; the department arrogating it, would elevate itself above the constitution; overturn the foundation on which its own authority rests; demolish the whole frame and texture of our republican form of government, and prostrate everything to the worst species of tyranny and despotism, the ever-varying will of an irresponsible multitude. The powers of government are trusts of the highest importance; on the faithful and proper exercise of which, depend the welfare and happiness of society. These trusts must be exercised in strict conformity with the spirit and intention of the constitution, by those with whom they are deposited; and in no case whatever, can they be transferred or delegated to any other body or persons; not even to the whole people of the state, and still less, to the people of a county.

It is a plain proposition of law, that a power or authority vested in one or more persons to act for others, involving, in its exercise, judgment and discretion, is a trust and confidence reposed in the party, which cannot be transferred or delegated. The making of laws is the highest act of sovereignty that can be performed in a free nation; and therefore, the legislative power may be truly said to be the supreme power of a state. Its exercise requires superior intellectual faculties, improved by study and



(What questions may be submitted to a popular vote.)

experience; although it seems to be a common notion with many pretended advocates of popular rights, at the present day, that every man is instinctively fitted to be a member of the legislature. If the legislative functions can be transferred or delegated to the people, so can the executive or judicial power. The absurd spectacle of a governor referring it to a popular vote, whether a criminal, convicted of a capital offence, should be pardoned or executed, would be the subject of universal ridicule; and were a court of justice, instead of deciding a case themselves, to direct the prothonotary to enter judgment for the plaintiff or defendant, according to the popular vote of a county, the community would be disgusted with the folly, injustice and iniquity of the proceeding.

All will admit that, in such cases, the people are totally incompetent to decide correctly. Equally incompetent are they to exercise, with discernment and discretion, collectively, or by means of the ballot-box, the power of legislation; because, under such circumstances, passion and prejudice incapacitate them for deliberation; and the tricks of demagogues, excited feelings, party animosities and the corrupting influences always brought to bear upon popular elections, would banish reason, reflection and judgment. If the delegation of the legislative power of a state to the people of a county, to make laws through the medium of a ballot-box, involving in it an abandonment by the legislature of the trust reposed in them, which they have sworn to execute with fidelity, does not seem to many persons to be destructive of the constitution, and to lead to all the dangers of a democracy, it can be only because it is presented under the specious appearance of a profound deference and devotion to the popular will, and because its destructive tendencies are clouded and obscured by the incense of adulation offered to the majesty of the people.

The question then arises, whether the act of the 19th of February last, transfers or delegates legislative power. If it does, it is unconstitutional.

(What questions may be submitted to a popular vote.)

The legislature, at their late session, were urged by numerous petitions, signed by a large number of very respectable citizens, to refer it to the people to decide, whether the laws licensing the sale of intoxicating liquors should be repealed. If the members of the legislature, by the convictions of their own judgment, were assured that the sad evils of intemperance flowed from the existence of these laws, it was their duty to repeal them; or to introduce such modifications as might destroy their baneful influence; this course was required of them, although the will of the constituents of many of the members might have been opposed to it. The doctrine of the common law is, that a member of a legislative body, although elected by a particular county or district, is bound, in the performance of his functions, to act, not merely for the benefit of his own constituents, but for the whole state. The opinions and will of his constituents ought always to command the most respectful attention; but if clearly opposed to his deliberate judgment, to the principles of the constitution, to the dictates of sound morality, or to the public welfare, as an honest and upright man, he ought not to obey them. "The representative," says Mr. Burke, "owes to his constituents, not only his industry, but his judgment; and he betrays, instead of serving them, if he sacrifices it to their opinion." Our legislature, acting with the best intentions, and following the precedents set by the legislatures of other states, the constitutionality of which had never been brought to the test of a legal decision, declined the responsibility which it was their duty to assume; and thus devolved the performance of their trust on the people of each county; in order that a majority, on whom no responsibility rested, might decide a question which none had the authority to decide, but the legislature.

The laws licensing the sale of spirituous and vinous liquors are valid laws; and they must remain in force, until repealed or modified by the regular and constitu-

(What questions may be submitted to a popular vote.)

tional exercise of the legislative power; by a law passed by the senate and house of representatives in general assembly met. No such law has been, or was intended to be passed by the legislature; they purposely avoided it. They merely left the subject to the people of each county, to decide by ballot, whether the license laws should be repealed or not, within such a county; and until such decision should be made by a majority of the legal voters, the laws were to remain in full force. The people of each county were to act on the subject, and not the legislature; the license laws were to be repealed in a county, not by the will of the legislature, but by the will of a majority of the citizens who voted in such county, although it might be against the will of a majority of the citizens of the state; by the exercise of legislative power by the people of a county, which could not be done by the people of the state; by a law (falsely so called) enacted and passed through the medium of ballot-boxes, and not a law enacted by the senate and house of representatives of the State of Delaware in general assembly. The design and true character of the act of the 19th of February last, are, to confer the functions of the legislature of the state upon the people of a county; to give them the means of exercising legislative power, by authorizing them to decide by their votes, whether the retailing of intoxicating liquors should thereafter be lawful in their county.

A law when passed by the legislature, is a complete, positive and absolute law in itself, deriving its authority from the legislature; and not depending for the enactment of its provisions, upon any other tribunal, body or persons. It may be limited to expire at a certain period; or not to go into operation until a future time, or the happening of a contingency, or some future event; or until some condition be performed. Of this description are many of the laws of the general government respecting duties and imposts; and laws of our own state respecting private corporations; which latter are not to operate until some con-

(What questions may be submitted to a popular vote.)

dition be performed, or the assent of the corporators be given; because a private incorporation is a contract between the state and the corporators, and therefore, the legislature cannot compel persons to become an incorporated body; or, against their consent, impair, alter or repeal the rights and privileges conferred by the charter. All such laws are complete and positive in themselves, when they pass from the hands of the legislature, and are not to become laws by the creative power of other persons.

But the legislature are invested with no power to pass an act, which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body, by whose will also existing laws are to be repealed, or altered and supplied. The act of the 19th of February 1847, is of this character; in a legal sense, it is not a law; it is not complete and positive in itself; it is not a rule prescribed by the supreme power of the state to its citizens, enforcing some duty or prohibiting some act; but was to become a rule only when enacted or sanctioned by the popular vote of a county; and then to be a rule prescribed, not by the constitutional legislative power of the state, but by the power of the majority in a county over the minority. Excepting the 5th section, the act of February last, in effect, is in the nature of a bill prepared and presented by the legislature of the state to the people of each county to be enacted or rejected by them. It contains, in substance, three propositions:—

1. That the court of general sessions of the peace and gaol delivery shall not recommend any person or persons for licenses to sell intoxicating liquors; that the retailing of them shall be prohibited as a nuisance, except when sold for medicinal or sacramental purposes, or to be used in the arts.

2. That it shall be the duty of the same court to license a competent number of persons to keep temperance houses,

(What questions may be submitted to a popular vote.)

without the sale of intoxicating liquors; and a sufficient number of storekeepers, physicians and apothecaries to sell spirituous and vinous liquors for medicinal and sacramental purposes, and to be used in the arts, but for no other purposes whatsoever.

3. That every person or persons who shall sell or deliver any intoxicating liquors, except for the purposes before mentioned, shall be liable to indictment, and on conviction be fined, in not less than \$20, nor more than \$100.

The people are called upon to decide the matter by ballot, at the usual places of holding elections; on each ballot is to be written or printed the words "license," or "no license;" if there be a majority of votes for "no license," the several propositions contained in the act are, by such majority, enacted into a law, and the license laws are repealed; if a majority of votes be for "license," the propositions are rejected, and the license laws continue in force. There is no substantial difference between this, and the case of a bill introduced into either branch of the legislature; in the latter, the bill becomes a law by a majority of the votes of the members of each house; in the former, by a majority of the votes of the people of a county, at an election.

But the act of the 19th of February, delegates the legislative power of the state to be exercised by the people of each county, not only in a single instance, but year after year. By the 5th section, whenever one-fourth in number of the legal voters at the last preceding election in any county, shall request the levy court to present the question of "license" or "no license," again to the people, it becomes the duty of the levy court to give public notice thereof; and the question is to be again decided by ballot, on the next succeeding first Tuesday in April; and so on, in every year in which such written request shall be made. By the constitution of this state, the legislative power cannot be called into action oftener than once in every two years, except by the governor upon extraordinary

(What questions may be submitted to a popular vote.)

occasions; and then to be exercised only by a senate and house of representatives; but the 5th section of this act, transcending the constitution, authorizes a minority of voters in each county to call into action every year, the legislative power on this subject, to be exercised by the people of such county through a ballot-box; thus, actually annulling the constitution, and subverting our form of government. Although such absurd and pernicious consequences are the result, the section referred to is strictly in accordance with the principle and intention of the act itself, which proceeds on the assumption, that as legislative power is derived from the people, it may be transferred back to, resumed and be exercised by them; and that a law which they make, in the exercise of such power, is valid and binding. It is a legal maxim, that the same authority and strength which create an obligation, are required to annul or dissolve it; therefore, if such a misnamed law be valid, it cannot be suspended, changed or repealed, except in the manner in which it was made, and by the same authority, that is, by means of a popular election, and by a majority of persons voting at such election.

But it is argued, that the act of February last does not transfer or delegate legislative power; that the legislature have the right to pass conditional laws, which are to commence their operation or to be void upon the happening of some future event, or some contingency; that this act is one of that character, and does not differ in principle from several acts of congress and statutes of our own state, whose validity has been affirmed by judicial decision. By way of illustration we are referred to the cases of *The Aurora v. United States*, 7 Cranch 382; *Steward v. Jefferson*, 3 Harrington 335; and *Gray v. State of Delaware*, 2 Harrington 76.

In the first case, it appears, that on the 1st of March 1809, congress passed an act interdicting commercial intercourse between the United States and Great Britain

(What questions may be submitted to a popular vote.)

and France, commonly called the non-intercourse law, which, by the 19th section, was to continue in force until a certain period and no longer; that by the 4th section of the act of congress of the 1st of May 1810, on the same subject, it was declared that, in case either of those nations should revoke or modify her edicts, so that they should cease to violate the neutral commerce of the United States, the president should declare the fact, by proclamation; and if the other nation should not, within three months afterwards, revoke or modify her edicts in like manner, then that certain enumerated sections of the act of the 1st of March 1809, should be revived and be in full force so far as related to such nation; and in regard to the nation revoking or modifying her edicts, that the restrictions imposed by the act of the 1st of May 1810, should, from the date of such proclamation, cease and be discontinued. The supreme court of the United States decided, that the legislature may make the revival of an act depend on a future event, and direct that event to be made known by proclamation; that there was no sufficient reason why it should not exercise its discretion in reviving the act of 1st March 1809, either expressly or conditionally; and that the 19th section of that act could not restrict their power of extending its operation, without limitation, upon the occurrence of any subsequent combination of events.

There is not the slightest resemblance between the law of congress and the act of our legislature. The non-intercourse law was complete and perfect in itself, when it passed from the hands of its makers; the act of May 1810, declared it should be revived on the happening of a subsequent event, to be made known by the president's proclamation, which operated simply as a rule of evidence, but did not make or enact the law. Had the president been empowered to repeal existing laws, and create a new law, by the exercise of his will, and to announce his decision by a proclamation, as the people of New Castle county were empowered to do, and to have their decision an-

(What questions may be submitted to a popular vote.)

nounced by the returns of an election, there would be an analogy between the two cases. Were it possible to suppose such an absurdity on the part of congress, their act would have been declared void, which thus undertook to transfer the legislative power exclusively to the president, and to abrogate the constitution.

In the case of *Steward v. Jefferson*, the court of errors and appeals of this state held, that the supplement to the act for the establishment of free schools, authorizing a tax to be laid in each district by a majority of the school voters in such district, was a constitutional law. It is argued, that the power of taxation is legislative power; that this power is delegated by the school law to the voters in each school district, authorizing them to raise taxes for the support of their schools, and that the operation of the law, so far as regards the tax, depends on the popular vote of the district. By the law of this state for establishing and supporting free schools, each school district is constituted a corporation with limited powers; the clear income of the school fund is apportioned among the several counties; the share of each county is divided among the several school districts of such county, and an equal portion given to each, as a *donation*, provided, the voters in such district raise by *subscription* or *tax*, in any one year, a sum equal to one-half of such district's share of the school fund. (8 Del. Laws 21.) But no such tax can be levied or assessed in any school district, unless, upon a vote by ballot, there shall be a majority of votes for the tax. (8 Del. Laws 171.) In the distribution of the school fund, the legislature had the right to appropriate an equal portion to each school district, as a *donation*; and to prescribe as a condition, that before it should be paid, a certain sum should be raised in the district, either by a voluntary subscription or by a tax, as should be determined upon by the corporators themselves. No power is granted to them, or to any other persons, to repeal or change any part of the law; nor does its existence



(What questions may be submitted to a popular vote.)

or operation depend on the performance of the condition, or in any manner, upon the will or acts of the corporators. If the condition be not performed, the defaulting district loses its portion of the fund; which, after a certain period, is appropriated to the support of free schools in the other districts.

No ingenuity can discover the shadow of similitude between the act of the 19th of February 1847, and any part of the school law. To say that the authority given to the school voters (to members of a corporation) to determine whether a tax shall be laid or not, is a grant of legislative power, is an abuse of language. Legislative power is the power of making laws; the making of a law prescribing by what persons, or by what body, when, and in what manner, taxes shall be laid and collected, is the exercise of legislative power; but the making of a resolution or order, or the determination or direction, by the persons or body appointed for such purpose by the law, that taxes shall be laid or collected, is simply the execution of an authority granted by statute; the collection of them is the performance of a mere ministerial duty. The imposition of taxes, therefore, by managers of marsh companies and other incorporated bodies, and by the levy court of a county, is the execution of an authority granted by the statute which appointed them as the proper persons or body to carry its provisions into effect; it is not the exercise, in any sense of the term, of legislative power.

The case of *Gray v. State of Delaware*, 2 Harrington 76, does not announce any such principle as that the legislative power of the state may be delegated; and although the point was argued, the case does not profess to decide it. The decision is merely that the Mayor's Court of the city of Wilmington has jurisdiction to try cases of assault and battery. It was not necessary to decide that the mayor's court could try such cases without the intervention of a jury, as it appeared from the record, that the plaintiff in error had submitted himself to that mode of

(What questions may be submitted to a popular vote.)

trial. (p. 88.) The argument of the learned judge, which appears in the report of that case, goes only to the extent, that as the general assembly had the right, under the 15th section of the 6th article of the constitution, to confer on the mayor's court jurisdiction in cases of assault and battery, either with or without trial by jury, it was not a delegation of the legislative power of the state, to enact in the city charter, that the mayor's court should have power to try such cases, "with or without trial by jury, as should be provided by the ordinances of the said city."

The granting of an act of incorporation is the exercise of legislative power. To make ordinances for its own government, subject to the control of the legislature, and not inconsistent with the constitution and laws of the state or of the United States, is one of the rights inseparably incident to every corporation aggregate; this is implied by law from the very act of incorporation itself, although the charter may be silent on the subject. With what show of reason then can it be said, that the power, whether expressed in the charter or not, to make ordinances for the management of the local concerns of the corporation, and the government of its members, is a transfer or delegation of the legislative power of the state? Or that it is anything else than the execution of an authority or trust expressly or impliedly conferred by the act of incorporation; an act which is a complete law in itself, and not in the power of the corporation, or of any body or set of men, to change, alter or abrogate, except the legislature; and deriving all its power and efficiency from that source and no other?

The city of Wilmington is a municipal corporation, invested, by the express terms of its charter, with power to make ordinances, subject to the control of the legislature, for its own local purposes, and the government of the city, which can effect none but those who come within its jurisdiction, or who have assented to them, by themselves or their representatives. An ordinance, then, is

(What questions may be submitted to a popular vote.)

but a law of the city; the making of it is the exercise only of the law-making power of the city; and the authority to make it cannot be a delegation of the legislative power of the state. Therefore, when the charter gave to the mayor's court the power to hear and determine assaults and batteries, with or without trial by jury, the mode of trial was properly left to be regulated by an ordinance of the city.

But the defendant's counsel contend, that the act of February 1847 is valid, because it is merely a conditional act, to take effect upon a contingency—upon the result of a popular election. Admitting it, in that sense of the term, to be a conditional act, and further, that it is an act perfect and complete in itself, and instead of giving power to the people of a county, to repeal, enact, change and reenact laws, it expressly repealed the license laws and prohibited the sale of intoxicating liquors in every part of the state; but before it shall go into operation, let us suppose, that it is to be submitted to the vote, not of the people of a county, but of the people of the whole state, for their approval or disapproval; if approved by the majority, it is to become a law; if disapproved it is not to become a law. This presents the case in the most favorable point of view for the defendant. But were such the character of the act, it would as clearly be unconstitutional, as it is in its present form; in the one case, the people of the state are constituted a component part of the legislature; in the other, the legislative power of the state is delegated to the people of a county. In the former case, a new power in legislation is introduced, unknown to the constitution; but which the legislature undertake to grant, by requiring the assent or dissent of the people to the enactment of laws; a power commonly called the *veto* power; and which was expressly refused to the executive, by the convention that formed the constitution. In the latter case, by vesting the law-making power in the people, the legislature venture to introduce a pure democracy, and thus to sub-

(What questions may be submitted to a popular vote.)

vert the constitution of this state, and infringe upon that of the United States, which guaranties to every state a republican form of government.

The very object of having two distinct branches of the legislature, and each to act separately from the other, is to avoid hasty and precipitate legislation, and the evils arising in single assemblies, from passion, prejudice, party animosities and the intrigues of demagogues. If the legislature were to pass a bill, not by the action of each house separately (the course prescribed by the common law), but by both houses in joint meeting, it would be void. But they assume the power of authorizing the people, collectively, not of the state, but of a county, to make a law, which the legislature themselves, collectively, cannot make.

It has been urged with much force, that the legislature have no authority to call into action the elective franchise, in any other cases, or for any other purposes, than those designated by the constitution; that the peace and harmony of society are not to be invaded, nor the passions of the people excited, by calling them out to vote upon speculative questions of morals or policy; that the meaning of an election and the legitimate object of the ballot-box, are the choice of men to fill public offices, and of representatives to carry out political measures for the interest and welfare of their constituents and the community at large; and that every conceivable case where such an election can be necessary or proper for public purposes, is provided for by the constitution itself. There is much strength in the argument; and it may well be questioned, whether the legislature, constitutionally, possess such authority.

But it is quite certain, that they usurp power, when they call on the people to legislate by the ballot-box; if they can refer one subject, they can refer any other, to popular legislation; there is scarcely a case, where much diversity of sentiment exists, and the people are excited and agitated by the acts and influence of demagogues, that

(What questions may be submitted to a popular vote.)

will not be referred to a popular vote. The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, is among the worst evils that can befall a republican government; and the legislation depending upon them, must be as variable as the passions of the multitude; each county will have a code of laws different from the others; murder may be punished with death in one, by imprisonment, in another, and by a fine, in a third; slavery may exist in one, and be abolished in another. The law of to-day will be repealed or altered to-morrow, and everything be involved in chaos and confusion. The general assembly will become a body merely to digest and prepare legislative propositions; and their journals a register of bills to be submitted to the people for their enactment. Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary and excited majorities, will be thrown down; and a pure democracy, "the worst of all political evils," will hold its sway under the hollow and lifeless form of a republican government.

The only check which the constitution interposes to an act of the legislature tending to such consequences, is an independent and upright judiciary. As the act passed on the 19th of February 1847, entitled "an act authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them," is repugnant to the principles, spirit and true intent and meaning of the constitution of this state, and tends to subvert our representative republican form of government, it is the unanimous opinion of this court, that the said act is null and void; and that judgment be rendered by the superior court, for the plaintiff.

(What questions may be submitted to a popular vote.)

The precedent set by the court of errors and appeals of the state of Delaware, in *Rice v. Foster*, was adopted and followed by the supreme court of Pennsylvania, in *Parker v. Commonwealth*, 6 Penn. St. R. 507, in which case, Bell, J., delivering the opinion of the court, said that although the government of Pennsylvania was not one of enumerated powers, still, it was a government of limited authority, and that the action of its legislature might be invalid, though it should contravene no express provision of the constitution, if it were in violation of the spirit of that instrument, and the genius of the public institutions created by it. That the people having, by their fundamental law, decreed that the legislative power should be vested in a general assembly, to consist of a senate and house of representatives, had solemnly divested themselves of all right, directly, to make or declare the law, or to interfere with the ordinary legislation of the state. That the power of making laws, vested in the general assembly, was not so much a privilege, as a duty; and that it could not be delegated by them to a portion of the people. That the act of 1846, as it left the halls of legislation, was imperfect and unfinished; for it lacked the qualities of command and prohibition absolutely essential to every law; and that it could not receive vitality from the *flat* of a portion of the people expressed by a popular vote. For these reasons, it was declared unconstitutional and void.

The same principle had been enunciated by Chief Justice Gibson, in the case of the Borough of West Philadelphia, 5 W. & S. 283: he there says, that "under a well-balanced constitution, the legislature can no more delegate its proper function, than can the judiciary; it is on the lines which separate the cardinal branches of the government, that the liberties of the citizen depend; for a consolidated sovereignty, in whatever form, is a despotism, in so far as it subjects the governed, not to prescribed rules of action, to which he may safely square his conduct beforehand, but to the unsettled will of the ruling power, which cannot be foreseen; and a government becomes consolidated in proportion as its legislative branch abandons its own functions, or usurps those which have been vested elsewhere."

And in *Barto v. Himrod*, 8 N. Y. 483, it was decided by the court of appeals of New York, that their act to establish free schools throughout the state, was unconstitutional and void, for the reason that the fact of its becoming a law was made to depend upon the result of a popular vote. In that case, Willard, J., said, "the law under con-

(What questions may be submitted to a popular vote.)

sideration is in conflict with the constitution in various respects ; instead of becoming a law by the action of the organs appointed by the constitution for that purpose, it claims to become a law by the vote of the electors ; and it claims that the popular vote may make it void and restore the former law. All the safeguards which the constitution has provided are broken down, and the members of the legislature are allowed to evade the responsibility which belongs to their office. If this mode of legislation is permitted, and becomes general, it will soon bring to a close the whole system of representative government, which has been so justly our pride ; the legislature will become an irresponsible cabal, too timid to assume the responsibility of lawgivers, and with just wisdom enough to devise subtle schemes of imposture, to mislead the people. All checks against improvident legislation will be swept away ; and the character of the constitution will be radically changed."

So, in the case of the Cincinnati, Wilmington and Zanesville Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. R. 84, the court say, that "the authority of the general assembly is much too broadly stated, when it is claimed, that all their acts must be regarded as valid, which are not prohibited by the constitution ; a moment's attention to principles, which may be regarded as fundamental in all the American systems of government, will demonstrate the unsoundness of such a conclusion ; one of these principles, lying at the very foundation of these systems, is, that all political power resides with the people. They have, therefore, the most undoubted right to delegate just as much or just as little, of this political power, with which they are invested, as they see proper, and to such agents and departments of government as they see fit to designate. As the general assembly, like other departments of the government, exercises only delegated authority, it cannot be doubted, that any act passed by it, not falling fully within the scope of legislative power, is as clearly void, as though expressly prohibited. That the general assembly cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one. This inability arises no less from the general principle applicable to any delegated power requiring knowledge, discretion and rectitude, in its exercise, than from the positive provisions of the constitution itself. The people, in whom it re-

(What questions may be submitted to a popular vote.)

sided, have voluntarily relinquished its exercise, and have positively ordained that it *shall* be vested in the general assembly. It can only be reclaimed by them, by an amendment or abolition of the constitution, for which they are alone competent; to allow the general assembly to cast it back upon them, would be to subvert the constitution, and change its distribution of powers, without their action or consent. The checks, balances and safeguards of that instrument, are intended no less for the protection and safety of the minority, than the majority; hence, while it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence and integrity of the whole representation of the state." The law was held to be the same in Iowa, in *Geebrick v. State*, 5 Iowa 491. See also *Chase v. Miller*, 41 Penn. St. R. 422; *People's Railroad v. Memphis Railroad*, 10 Wall. 50. In Maryland, the case of *Rice v. Foster* is not held to be law; *Hammond v. Haines*, 25 Md. 541; nor is it, in New Hampshire; *State v. Noyes*, 10 Fost. 279. And see *State v. O'Neill*, 24 Wis. 149; *Smith v. City of Janesville*, 3 Chicago Leg. News 227.

But the decision in *Parker v. Commonwealth*, settled nothing more than that the general assembly of the commonwealth could not delegate to the people the power to enact laws, by the exercise of the ballot, affecting the property and binding the political and social rights of the citizens; it did not prevent the legislature from submitting to a vote of the people the question of the creation of a new township; *Commonwealth v. Judges of the Quarter Sessions*, 8 Penn. St. R. 391; the division of a county; *People v. Reynolds*, 5 Gilman 1; the consolidation of certain adjacent territory into one municipal corporation; *Smith v. McCarthy*, 56 Penn. St. R. 359; or the question of a municipal subscription to the stock of a railroad company; *Moers v. City of Reading*, 21 Penn. St. R. 188; *Cincinnati, Wilmington and Zanesville Railroad Co. v. Commissioners of Clinton County*, 1 Ohio St. R. 77; *Talbot v. Dent*, 9 B. Mon. 526; *Slack v. Maysville and Lexington Railroad Co.* 13 B. Mon. 1; *Louisville and Nashville Railroad Co. v. County of Davidson*, 1 Sneed 637. It cannot be said that the exercise of such a discretion, is the making of a law; there is no reason why the acceptance of a new power, tendered to a public corporation, may not be made to depend on the will of the people. 21 Penn. St. R. 202.



## ANDERSON v. BAKER.

In the Court of Appeals of Maryland.

OCTOBER TERM 1865.

(REPORTED 23 MARYLAND 531.)

*[States' rights to regulate the elective franchise.]*

Among the absolute, unqualified rights of the states, is that of regulating the elective franchise ; it is the foundation of state authority.

The right of suffrage is altogether a conventional one ; it may be granted, abridged or taken away, by the state government, in its discretion, except so far as it is secured by the state constitution.

This was an appeal from an order of the Circuit Court for Montgomery county, dismissing the petition of the appellant for a writ of *mandamus*, to be directed to the appellees, officers of registration, commanding them to register his name on the list of registered voters for the said county and district, wherein he resided.

The petitioner set forth that he was, and for many years past had been, a citizen of Maryland, residing in the fourth election district of Montgomery county ; that theretofore he had there possessed and exercised the right of suffrage, without hindrance or question, and that he had done no act by which any of his rights as a citizen could be justly forfeited or impaired ; he also averred that, under the supposed authority of the first article of the constitution, and of the act of 1865, ch. 174, the respondents were appointed to register the voters of his election district ; that he duly appeared before them and demanded that he should be unconditionally registered as a legal voter, and that they refused so to do ; he then charged, in support of his alleged right to unconditional registration, that the provisions of the constitution and act above mentioned, in so far as they prescribed the test oath to be administered

(States' rights to regulate the elective franchise.)

to persons applying for registration, as a condition of the right to be registered, were *ex post facto* laws, within the meaning of the tenth section of the first article of the federal constitution, and therefore void.

*Brent, Pratt and Reverdy Johnson*, for the appellant.

*Randall*, Attorney-General, and *Williams*, for the appellees.

BOWIE, C. J., delivered the opinion of the court. This is, substantially, an inquiry into the power of the people of a state, in convention assembled, to regulate the elective franchise, and prescribe the qualifications and disqualifications of voters. It is not to be determined by the passions or the prejudices of the hour, but upon principles which lie at the base of all government. Not only Maryland, but all the states of the union, and those which may be admitted, are deeply interested in the principles in question.

It is the first instance in which the acts of a convention have been sought to be restrained by judicial interposition, upon the ground of their inconsistency with the federal constitution. The novelty, as well as the importance of the questions, dictate the utmost caution in arriving at conclusions which may prejudice, not individuals only, but communities of men. It is the highest exercise of judicial authority to set aside *legislative* acts, because of their violation of the fundamental law; how transcendent the power which annuls the *organic law* of the state, from which it derives its being! "All judicial authority presupposes the validity of the constitution under which it acts."

In the distribution of powers among different functionaries, it often happens, that each functionary or department must decide upon the constitutionality of the exercise of such power, and in many cases, these decisions become final and conclusive, being from their nature and character

(States' rights to regulate the elective franchise.)

incapable of revision: "thus, in measures exclusively of a political, legislative or executive character, as the supreme authority, as to these questions, belongs to the legislative and executive departments, they cannot be re-examined elsewhere." 1 Story Const. § 374. "The remedy, in such cases, is solely by an appeal to the people at the elections, or by the statutory power of amendment provided by the constitution itself." Ibid. The convention concentrated in itself all these powers, its members assumed the same oath to support the constitution of the United States which is taken by all officers, state and federal, and must be presumed to have been equally observant of its obligations.

The powers of a convention of the people of a state assembled to frame a form of government, are nowhere defined. It is the right of the people to alter or abolish, or institute a new government, "laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." The convention is the depository of the residuary or reserved sovereignty of the people, unlimited, except so far as restrained by the constitution of the United States and the moral law; whether their action is dependent upon the subsequent ratification of the people or not, is not clearly established; but when ratified and adopted, or acquiesced in, their acts are unquestionable, within the limits prescribed; the wisdom or wantonness of the act, its effect upon majorities or minorities, are not subjects of judicial cognisance; these are determined by their adoption. The courts are not to inquire how many will be affected by their decision, or to look to the multitude for their vindication; the rights of a single citizen are as valuable, in the eye of the law, as those of thousands.

Unity in the great ends and objects of government, is the source of all political power in republics; for the promotion of these objects, the people of the United States ordained and established a constitution which was the

(States' rights to regulate the elective franchise.)

supreme law, and erected a *national*\* government to which they owed paramount allegiance. 2 Hill 248. This supreme government was assailed, its authority defied, its capital invested, the territory of Maryland (whose people had adopted it) invaded by armies, her towns placed under contribution, her citizens slain and imprisoned, in the name and in behalf of the Confederate States of America. A sovereign convention of the people assembled in the midst of this civil convulsion, endeavored to strengthen and cement the union, by removing the great causes of rebellion, the motives for its continuance, encouragement and support, and to secure themselves from anarchy, and social as well as civil war. They framed a declaration of rights and constitution, submitted them to the people for ratification, and after their adoption had been proclaimed, the old government was superseded and a new one inaugurated. The executive, legislative and judicial departments have all sworn to support and maintain it as such. This constitution, it is conceded, must be assumed and recognised as the organic law of the state.

The chief characteristics which distinguish it from former instruments of the kind are, the declaration of the fundamental principle, that "every citizen of this state owes paramount allegiance to the constitution and government of the United States, and is not bound by any law or ordinance of this state in contravention or subversion thereof;" its incorporation with the right of suffrage; and the abolition of involuntary servitude, except for crime. It is manifest, that a leading object of the convention was, to repudiate the doctrine, that any state could, by law or ordinance, absolve its citizens from the obligation of obedience to the constitution and government of the United States, and to render the union indissoluble, by excluding from the polls and offices of the state, all who

\* The constitution terms it the *general* government; the word "*national*" was stricken out by the convention of 1787.

(States' rights to regulate the elective franchise.)

had actively participated in promoting the rebellion, or giving it aid and comfort. "Allegiance is the ligature that binds the citizen to the government which protects him." It is the very antipodes of treason, which, according to the common law definition, is a violation of the contract of allegiance. The Confederate States had attempted to dissolve the bond of the union and legalize treason, by the sophistry of secession; some states yielded only a partial allegiance; Maryland avowed paramount allegiance as the antidote of the right of secession. The prevalence of this political theory was urged by one of the counsel for the relator, in extenuation of those engaged in the rebellion; its existence is not less an apology (if one is needed) for the action of the convention. If it so pervaded the people, that organized armies were ready to destroy the government their fathers framed, it became the more necessary for the friends of that government to strengthen the hands of those who were charged with its defence. Without some such provision, citizens of Maryland in arms against the United States, would have been qualified voters at the ensuing elections; the soldiers of Stuart and Early, should the war have continued, might have claimed the right of suffrage unchallenged, under a constitution professing paramount allegiance to the United States; such an absurdity would have been too glaring to contemplate.

In promotion of this general purpose, the general assembly were required to provide by law for a uniform registration of the names of voters, which should be evidence of their qualification, at elections thereafter held; and to make effective the provisions of the constitution, disfranchised certain classes of persons. Const., Art. I., sect. 2; Art. III., sect. 41. In pursuance of these express constitutional commands, the act of the 24th of March 1865, was passed.

It is insisted, that this law is null and void, because it violates the constitution of the United States, and the

(States' rights to regulate the elective franchise.)

constitution of the state, in execution of which it was enacted; and further, that the 4th section of the first article of the constitution of Maryland, disqualifying certain classes, is in conflict with that of the United States, and therefore void. Three propositions are assumed as the basis of these conclusions: 1. The franchise of voting is an inalienable right of property, *sui generis*: 2. The 4th section of the 1st article of the constitution of Maryland, and the registry law, are in the nature of a bill of attainder, which includes also bills of pains and penalties: 3. The disqualifications, including the test oath, declared by the 4th section of the 1st article, and the provisions of the registration act, are violations of the 10th section of the 1st article of the constitution of the United States, declaring that "no state shall pass any bill of attainder or *ex post facto* law.

It is conceded by the argument of the senior counsel for the relator, that sovereign conventions of the people, prior to the adoption of the federal constitution, had unlimited power to fix, change or modify the qualifications of voters, but that since its adoption, they are restrained by the 10th section of the 1st article of that instrument. This, we apprehend, is a *petitio principii*; it is the question before us, whether, properly construed, there is any limitation of the power the people of the states previously possessed and exercised in that respect. There is no allusion to any such purpose in the contemporaneous expositions or subsequent commentaries on the federal constitution, by its friends or its adversaries; on the contrary, the inference is almost irresistible, that no such limitation would have been tolerated. Rawle Const. ch. 4, p. 41; 1 Story Const. § 548.

Among the absolute, unqualified rights of the states, is that of regulating the elective franchise; it is the foundation of state authority; the most important political function exercised by the people in their sovereign capacity. The third article of the declaration of rights affirms, "that the people of this state ought to have the *sole and exclusive*

(States' rights to regulate the elective franchise.)

*right* of regulating the internal government and police thereof." Whilst "the right of the people to participate in the legislature, is the best security of liberty and foundation of all free government," yet, it is subordinate to the higher power of regulating the qualifications of the electors and the elected. The original power of the people, in their aggregate political capacity, is delegated, in the form of suffrage, to such persons as they deem proper, for the safety of the commonwealth; hence, the right is limited to "every free white male citizen having the qualifications prescribed by the constitution." Citizenship and suffrage are by no means inseparable; the latter is not one of the universal inalienable rights with which men are endowed by their Creator, but is altogether conventional.

Story, treating of this subject, says, "every constitution of government in these United States has assumed, as a fundamental principle, the right of the people of the state to alter, abolish and modify the form of its own government, according to the sovereign pleasure of the people; in fact, the people of each state have gone much further, and settled a far more critical question, by deciding who shall be the voters entitled to approve and reject the constitution framed by a delegated body under their direction." 1 Story Const. ch. 9, § 581. "From this it will be seen, how little, even in the most free of republican governments, any abstract right of suffrage, or any original and indefeasible privilege, has been recognised in practice." Ibid. "In no two of these state constitutions will it be found, that the qualifications of the voters are settled upon the same uniform basis, so that we have the most abundant proofs that, among a free and enlightened people, convened for the purpose of establishing their own forms of government, and the rights of their own voters, the question as to the due regulation of the qualifications, has been deemed a matter of mere state policy, and varied to meet the wants, to suit the prejudices and to foster the interests of the majority. An absolute, indefeasible right to elect or be

(States' rights to regulate the elective franchise.)

elected, seems never to have been asserted on one side, or denied on the other; but the subject has been freely canvassed, as one of mere civil polity, to be arranged upon such a basis as the majority may deem expedient, with reference to the moral, physical and intellectual condition of the particular state." Ibid. § 582.

None of the elementary writers include the right of suffrage among the rights of property or person; it is not an absolute, unqualified, personal right. Lord Holt, in *Ashby v. White*, placed it upon the ground that it was incident to the freehold which the voter owned, or to the burgh or corporation to which he belonged; that it was a part of the constitution of England, that these boroughs should elect members to serve in parliament, whether they be boroughs corporate or not corporate; in the one case, the right of election is a privilege annexed to the land, and may be properly called a real privilege; the second sort is, where a corporation is created by charter or prescription, and the members of the corporation, as such, choose members to serve in parliament. The first sort have a right of choosing as a real right, but in this last case, it is a personal right, and not a real one, and is exercised in such manner as the charter or custom prescribes; and the inheritance of this right is in the whole body politic, but the exercise and enjoyment of this right is in the particular members. 2 Ld. Raym. 950, 951.

The cases relied on by the appellant, have not been recognised as law in this state. *Ashby v. White* and *Lincoln v. Hapgood*, 11 Mass. 350, were reviewed and overruled in *Bevard v. Hoffman*, 18 Md. 483. In that case, this court said, "the decisions in those cases assert the principle, that a party who, like the plaintiffs, has been deprived of a right, is thereby injured, and must have his remedy. It seems to us, that the error of the application of that principle to this case, consists in misapprehension of what is the right of a citizen under our election laws. In one sense, if he is a legal voter, he has the right to



(States' rights to regulate the elective franchise.)

vote, and is injured if deprived of it; but the law has appointed a means whereby his right to vote is decided, and for that purpose has provided judges to determine that question, and has also provided the most careful guarantees for a proper discharge of duty by the judges, by the mode of their selection and their oaths of office. In all governments, power and trust must be reposed somewhere; all that can be done is, to define its limits and provide means for its exercise; when the act in question is that of a judicial officer, all that the law can secure is, a guarantee that they shall not, with impunity, do wrong wilfully, fraudulently or corruptly; if they do so act, they are liable both civilly and criminally; but for an error of judgment, they are not liable either civilly or criminally. If the citizen has had a fair and honest exercise of judgment by a judicial officer in his case, it is all the law entitles him to, and although the judgment may be erroneous, and the party injured, it is *damnum absque injuriâ*, for which no action lies; this, in our opinion, is the most reasonable rule, and it will be found supported by the weight of authority both in England and this country." *Bevard v. Hoffman*, 18 Md. 483, 484. In the case of injury to property, however unintentional the act, the party injured has his action for damages; even in cases of extreme necessity. All perfect rights have their remedy; but imperfect rights have none.\*

In New Jersey, Delaware, Virginia, Florida, Louisiana, Indiana, Illinois, Arkansas, Texas, Iowa, Missouri and Alabama, persons in the naval and military service of the United States were disqualified as voters (Cushing's *Lex Parl. Am.* § 23); the jealousy of federal influence excluding those in actual service from participating in elections. It would be an anomaly, if the foes of the government, its sworn enemies, should be preferred to its friends.

\* In *State v. Staten*, 6 Cold. 233, it was held by the supreme court of Tennessee, that the elective franchise is a right which the law protects and enforces as jealously as it does property in chattels or lands.

(States' rights to regulate the elective franchise.)

If the right of suffrage is a right of property, by what authority is it taken from one class and given to another, at the option of the conventions of the several states? The constitution of Maryland of 1777, authorized all free men, above twenty-one years, having a freehold of fifty acres in the county in which they offered to vote, and residing therein, and all free men, having property in this state above the value of £30 currency, and residing in the county, to vote. By the amendments of 1801, ch. 90, every free *white* male citizen, above twenty-one years, and no other, was entitled to the right of suffrage; thus, a large class who previously enjoyed the right were disfranchised.\* The appellant's position, if tenable, would render the amendment of the constitution of 1809, and all subsequent, excluding that class, inconsistent with the constitution of the United States and void. The same power which disqualified free colored men, in 1801, enabled the convention of 1864 to disqualify "all who had been in armed hostility to the United States."

Much reliance has been placed upon the case of *Kilham v. Ward* and *Gardner's* case, cited in the note to 2 Mass. 236, 244. These cases turned mainly upon the construction of an act of the state of Massachusetts, entitled, "an act to confiscate the estates of certain persons called absentees," who had levied war, or conspired to levy war, or who, since the 19th April 1775, had withdrawn without the permission of the legislature, &c., and who were declared to be aliens. The power of the legislature to pass such laws was not denied, but it was held, in *Kilham's* case, that he did not come within the intention of the law, and in *Gardner's* case, that the act pointed out the mode of prosecution, which had not been followed, *modo et formâ*. *Ibid.* 249, 264, 266.

"Every government ought to contain, in itself, the

\* Not so; a negro was never considered a freeman, within the meaning of the election laws, nor a component part of our political system. *Hobbs v. Fogg*, 6 Watts 553.

(States' rights to regulate the elective franchise.)

means of its own preservation." Fed. No. 58. For this reason, the regulation of the right of suffrage has been reserved by the states to themselves, and was not delegated to the general government, by the federal constitution. The qualifications of electors, by that instrument, are expressly confined to the qualifications for electors of the most numerous branch of the state legislature. Const. U. S., Art. I., sect. 2; 3 Ill. 395-6; Fed. No. 51. It has become a political axiom, that every state should control its domestic relations; the most ultra advocate of federal power would not deny this right to the states in the union. It is, therefore, a question of the utmost consequence, whether the brief prohibition, "no state shall pass any bill of attainder or *ex post facto* law," was designed to restrain the political power of the people over their fundamental law, or rather the civil power of the legislative branch of state governments. No other clause of the constitution of the United States is relied on.

Bills of attainder, as they are technically called, are such special acts of legislation as inflict capital punishments (or pains or penalties), upon persons supposed to be guilty of high offences, without any conviction in the ordinary course of judicial proceedings. 2 Story Const. § 1344. "*Ex post facto* laws are technical expressions, which include every law which renders an act punishable in a manner in which it was not punishable when committed; they relate to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which affect private rights retrospectively; retrospective laws, divesting vested rights, unless *ex post facto*, do not fall within the prohibition contained in the constitution of the United States, however repugnant they may be to the principles of sound legislation." 1 Kent Com. 409, 410, and authorities there cited.

Prohibitions on the states are not to be enlarged by construction; to do so, would violate the spirit and object of the 9th and 10th amendments to the constitution of the United States, viz: "The enumeration in the constitution

(States' rights to regulate the elective franchise.)

of certain rights, shall not be construed to deny or disparage others retained by the people. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." These were intended to prevent argumentative implications of power not delegated; to exclude any interpretation by which other powers should be assumed beyond those which are granted. The second section of the fourth article of the constitution of the United States, declares, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" yet, it has been held, a particular and limited operation is to be given to the words "privileges and immunities," not a full and comprehensive one; "they do not mean the right of election, the right of holding offices, or being elected." Chase, J., 3 H. & McH. 554. If terms so broad and comprehensive as these are restrained by a consideration of the objects intended, technical terms are not to be enlarged to an extent which will impair the jurisdiction of the states. It is obvious, the distinctive and obnoxious feature of *ex post facto* laws, is, the exercise of a judicial function by the legislature; punishing thereby as *crimes*, acts not before forbidden, or aggravating their punishment. The object and intention of the act fix its character; that which is preventive, is not necessarily punitive, although it may be accompanied by the withdrawal of privileges previously enjoyed. The political powers of a state, its preventive means, are not to be confounded with the assumption of judicial powers by a convention or legislature; the former must exist, for the safety of the state; the latter is prohibited, for the protection of the citizen. Vindictive motives are not to be imputed to the state; if they existed, perversion of a power does not make it unconstitutional.

The right of suffrage, being the creature of the organic law, may be modified or withdrawn by the sovereign authority which conferred it, without inflicting any punishment on those who are disqualified. The fourth section

(States' rights to regulate the elective franchise.)

of the first article of the constitution of Maryland, does not declare any act criminal which was not previously so, nor add to, alter or change the criminal code of the state. The acts referred to are generally such as come within the legal definition of treason, "levying war against the United States, or adhering to their enemies, giving them aid and comfort." "If war be levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." 4 Cranch 126; 2 Story Const. § 1801. But these acts are not defined as crimes; they could not be prosecuted as such in any court of the state, nor any judgment or conviction be had under the section referred to. The actors are described by their deeds, and a civil disability imposed upon them, for considerations of public policy.

The power thus conferred on the registrars, by the act of assembly, carrying into execution the provisions of the constitution, is a police or political power, closely analogous to that previously committed to the judges of election; a power, on the due execution of which, the inauguration and succession of the several departments of the government depend. Under the old system, the judges determined the qualifications of the voter at the polls; under the new, the registrars ascertain and enroll beforehand, subject alike to liability in damages, if they wilfully, corruptly or maliciously exclude any who are entitled. The inquisitorial and offensive manner in which these duties are said to have been, in some instances, discharged, is a just cause for public indignation, and speedy correction by the proper authority, but not sufficient to warrant a judgment annulling the law as unconstitutional.

It has been argued that, because the 3d and 5th sections of the 1st article disqualify persons convicted of larceny and bribery, as voters, in addition to the penalties now or hereafter to be imposed by law, the disqualifications of the

(States' rights to regulate the elective franchise.)

4th section are to be regarded as *in pari materia*, and penal inflictions, upon the principle of *nosceitur à sociis*. This is not a necessary deduction. Bribery and larceny were made disqualifications by the constitution of 1851; the clauses of the constitution of 1864, are nearly recapitulations of the provisions of the former instrument, referring to those crimes, except that the 5th section of the constitution of 1864 relates to the 4th of July 1851 (when the constitution of that year took effect), and covers all cases of bribery occurring in the meantime, not altering or changing in any manner the offence or its punishment. In section 3d, the disqualification is dissociated from any reference to penalty, and made the consequence of conviction, in the same connection with lunacy or persons *non compos*; in section five, it is, "in addition to the penalties now or hereafter to be imposed by law," a form of expression not materially differing from the former, or sufficiently so to justify the conclusion contended for.

It is said, the provisions of the registry law which provide the mode of appointment of the officers of registration, and authorize them to determine the qualifications of voters, with the test oath, are contrary to the bill of rights and the constitution of Maryland. The first branch of this objection, as to the mode of appointment, was not pressed. It is sufficient to say, there does not appear to the court any infringement in this respect of the 13th section of the 2d article of the constitution, defining the appointing power of the governor, namely, "he shall *nominate*, and by and with the advice and consent of the senate, appoint all civil and military officers of the state, whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office." The act in question, creating the office, does prescribe a different mode of appointment. Where the office is of legislative creation, the legislature can modify, control or abolish it, and within these powers is embraced the right to change the mode of appointment. *Davis v. State*, 7 Md. 161.

(States' rights to regulate the elective franchise.)

As to the supposed conflict between the constitution of Maryland and the bill of rights, as it is called, such a collision can scarcely occur, according to the accepted theory of the relation between these instruments. In representative constitutional governments, they are understood to be parts of a whole, constituting an entirety, and to be interpreted as one instrument; the declaration of rights is an enumeration of abstract principles (or designed to be so), and the constitution, the practical application of those principles, modified by the exigencies of the time or circumstances of the country. "If they differ, the constitution must be taken as a limitation of the principle previously declared, according to the subject and the language employed." *Mayor and Common Council of Baltimore v. State*, 15 Md. 459. The declaration of rights is a guide to the several departments of government, in questions of doubt as to the meaning of the constitution, and "a guard against any extravagant or undue extension of power," but does not control the constitution itself, when it is clear and unambiguous. As far then as the registration law is a legislative enactment of the 1st, 2d, 3d, 4th and 5th sections of the first article of the constitution, it is not restrained by the declaration of rights, because it proceeds from the same authority, that of the convention.

The perpetual and irrevocable character of these disqualifications has been dwelt upon; we have said that such consideration is beyond our reach, but, happily, the duration of such clauses is more nominal than real; provisions equally perpetual in terms have passed away with the exigency that dictated them. There is a redeeming sense of justice in the people, which may well be trusted, to remove, in the mode prescribed by the constitution, all traces of temporary excitement which prejudice their fellow-citizens.

We are reminded of our solemn obligations to support the federal constitution, and yet urged to come to conclusions which would prevent all further deliberation and

(States' rights to regulate the elective franchise.)

investigation in the court of last resort. To adopt such a course, with our convictions, would be contrary to the best-established principles and precedents. To declare an act of a co-ordinate department of the government an unwarrantable assumption or usurpation of power, because it is a violation of a constitutional prohibition, is an exercise of the judicial office of a grave and delicate nature, which can never be warranted but in a clear case. 12 Gill & Johns. 438. "The presumption must always be in favor of the validity of laws, if the contrary is not clearly demonstrated." Washington, J. "It must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication." 15 Md. 476-7. These axioms were applied to acts of ordinary legislation; the ultimate object of this appeal is, to annul the organic law of the state, the act of a sovereign convention, under which its present government is organized, and from which it derives its existence and authority. Our province is not to make or unmake constitutions, but to interpret them; not by the light of reason and common sense alone, or that higher law which has been invoked, but which has no oracle, but by the text of the constitution of the United States, as construed by its authorized expounders.

If we err in our conclusions, we congratulate ourselves, there is a supreme court erected expressly for the final adjudication of such questions, where our judgment may be reviewed and corrected, and the rights of the citizen vindicated. To this we cheerfully defer, confident that none will more cordially concur in the result.

Judgment affirmed.

BARTOL, J., dissented.

---

The exclusive right of the several states to regulate the exercise of the elective franchise and to prescribe the qualifications of voters, was never questioned, nor attempted to be interfered with, until the 15th amendment to the constitution of the United States was forced upon unwilling communities (the states then lately in rebellion), by the military power of the general government, and thus made a part of our organic law; a



(States' rights to regulate the elective franchise.)

necessary sequence, perhaps, of the civil war, but none the less a radical change in the established theory of our government.\*

In *Huber v. Reily*, 53 Penn. St. R. 115, it is said by Mr. Justice Strong, now of the supreme court of the United States, that "the constitution of the United States confers no authority upon congress to prescribe the qualifications of electors, within the several states that compose the federal union; congress is, indeed, empowered to make regulations for the time, place and manner of holding elections for senators and representatives (except those in relation to the places of choosing senators), but here its power stops; the right of suffrage at a state election is a state right, a franchise conferrable only by the state, which congress can neither give nor take away; if, therefore, the act now under consideration is, in truth, an attempt to regulate the right of suffrage in the state, or to prescribe the conditions upon which that right may be exercised, it must be held unwarranted by the constitution."

In Tennessee, it has been determined, that the elective franchise being a political right, each state may define it by its own constitution, or empower its legislature to do so; that the right of suffrage once granted, may be taken away by the exercise of the sovereign power, or forfeited for crime, under the laws of the state; and that the state having disfranchised those citizens who had engaged in armed rebellion against the general government, it was not in the power of the president of the United States, by a pardon, to restore their political rights under the state laws. The people of the state alone have the right to determine who shall exercise the right of suffrage. *Ridley v. Sherbrook*, 3 Cold. 569. And see *State v. Staten*, 6 Cold. 234; *Pomeroy's Const. Law*, § 207-9; *Fed. No. 51*.

---

\* Let it not be supposed from these remarks that the author is one of those impracticable politicians, who deny the validity of the 15th amendment; it is an accomplished fact, and therefore, having been passed by the forms of law, however much influenced by fraud or force, is now a part of the fundamental law, and binds the whole community. The question of duress has no place, when considering the effect of a change in a people's form of government; many acts which cannot be defended on moral grounds, when fully carried into execution, are binding upon a nation; the American revolution was wholly indefensible on theological grounds, and yet, when successful, it effected an entire change in the form of our government, and the new order of things bound the people to obedience, not only in fact, but in conscience also. So it is with the recent great changes in our constitution, they are accomplished facts, and as much a part of the organic law, as the original articles.

## McCafferty v. Guyer.

In the Supreme Court of Pennsylvania.

MAY TERM 1868.

(REPORTED 59 PENNSYLVANIA STATE REPORTS 109.)

[*Constitutional rights of electors.*]

The legislature cannot add to the constitutional qualifications of electors; one who is a qualified voter, under the constitution, cannot be deprived of the elective franchise, by a legislative enactment.

Error to the Common Pleas of Huntingdon. Action on the case by Edward McCafferty against George Guyer and others. In the court below, a case stated was agreed upon, from which the following facts appeared:

The plaintiff resided in Huntingdon county, and was liable to military service in the army of the United States; on the 30th May 1864, he was regularly drafted into the service, was duly served with notice, but refused to report; and was registered by the provost-marshal as a deserter. The plaintiff was an elector in the township of Warrior's Mark, Huntingdon county; the defendants were the judge and inspectors of the general election held on the 9th October 1866; on which day the plaintiff tendered his ballot to the defendants; and at the same time, there was produced to them, a duly certified copy of the rolls, showing that the plaintiff had been registered as a deserter; the defendants refused to receive the plaintiff's vote, on the ground that he had been disfranchised by the act of congress of 3d March 1865, and the act of assembly of Pennsylvania of 4th June 1866. It was agreed that, if the court should be of opinion that the plaintiff was a duly qualified elector, judgment should be entered in his favor for one dollar; otherwise, judgment to be entered for the de-

(Constitutional rights of electors.)

fendants. The court below entered judgment for the defendants, which was assigned for error.

*R. B. Petriken and G. W. Biddle*, for plaintiff in error.

*J. Scott*, for defendants in error.

STRONG, J., delivered the opinion of the court. The first section of the third article of the constitution determines, affirmatively, who shall have the rights of an elector; it ordains as follows: "In elections by the citizens every white freeman, of the age of twenty-one years, having resided in this state one year, and in the election district where he offers to vote, ten days immediately preceding such election, and within two years, paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector." The section also ordains that a citizen of the United States, who had previously been a qualified voter of this state, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote, after residing in the state six months; and also that white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the state one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.

By this charter, the plaintiff in the case stated had the rights of an elector, when he offered to vote; he had every qualification required by the constitution. It is true, he had been drafted into the military service of the United States, had failed to report after notice of the draft, and he was registered as a deserter; but not having been tried and convicted of desertion, he had not lost his citizenship, under the act of congress of 3d March 1865; this was decided in *Huber v. Reily*, 53 Penn. St. R. 112. He was

(Constitutional rights of electors.)

then entitled to vote, unless disqualified by the act of assembly of 4th June 1866. The first section of that act enacts that, in all elections, it shall be unlawful for the judge or inspectors of the election to receive any ballot or ballots, from any person or persons embraced in the provisions and subject to the disabilities imposed by the act of congress of 3d March 1865, and that it shall be unlawful for any such person or persons to offer to vote. The second and third sections impose penalties upon election officers for receiving such votes, and upon those disqualified as aforesaid for voting or offering to vote. The fifth and sixth sections prescribe what shall be evidence of desertion and consequent disqualification, declaring it to be, not the record of conviction and sentence, but certified copies of rolls and records, containing official evidence of the fact of the desertion of all persons who were citizens of the commonwealth, and who were deprived of citizenship and disqualified by the said act of congress. The act thus denies the rights of an elector to all who, under the act of congress, have been registered as deserters from the military service of the United States, even though they have not been tried, convicted and sentenced for the offence. It attempts to disfranchise those who are enfranchised by the fundamental law of the commonwealth, and it enacts what shall be the evidence of disfranchisement. It is not, it does not profess to be, a regulation of the mode of exercise of the right to an elective franchise; it is a deprivation of the right itself.

Can, then, the legislature take away from an elector his right to vote, while he possesses all the qualifications required by the constitution? This is the question now before us. When a citizen goes to the polls on an election day, with the constitution in his hand, and presents it as giving him a right to vote, can he be told—"true, you have every qualification that instrument requires; it declares you entitled to the rights of an elector; but an act of assembly forbids your vote, and therefore, it cannot be

(Constitutional rights of electors.)

received." If so, the legislative power is superior to the organic law of the state, and the legislature, instead of being controlled by it, may mould the constitution at their pleasure. Such is not the law; a right conferred by the constitution is beyond the reach of legislative interference; if it were not so, there would be nothing stable; there would be no security for any right; it is in the nature of a constitutional grant of power or of privileges, that cannot be taken away by any authority known to the government; it involves a prohibition of interference with it. Thus, it has been held, that the bestowal of judicial power upon courts, implies that the legislature shall not exercise it; so, the gift of a right to grant pardons, vested in the executive, is a denial of the possibility of granting pardons by any other branch of the government. It has always been understood, that the legislature has no power to confer the elective franchise upon other classes than those to whom it is given by the constitution, for the description of those entitled is regarded as excluding all others.

All these are only implied prohibitions; but the third article of the constitution is positive and affirmative; it declares that the persons described *shall* have the rights of an elector; an act of assembly that enacts that they shall not is, therefore, directly in conflict with it. It is plain, then, that the third article of the constitution is not, as it has been argued, merely a general provision defining the indispensable requisites to the rights of an elector, leaving to the legislature to determine who may be excluded; on the contrary, it is a description of those who shall not be excluded. Undoubtedly, power might have been conferred upon the legislature to restrict the right of suffrage; such power has been given by the constitutions of some other states, and the debates in the convention that formed that under which we now live, show that it was contemplated by some of the members, to introduce such a provision into ours; but it was not done, and therefore, the right of suffrage is, with us, indefeasible.

(Constitutional rights of electors.)

An argument in support of the power of the legislature to disfranchise one to whom the constitution has given the rights of an elector, is attempted to be drawn from the practice under the former constitutions, as well as under the present; on examination, however, it will be found to have little weight. The constitution of 1776 ordained, that "every freeman of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector." It also declared, that any elector who should receive any gift or reward for his vote, in meat, drink, moneys or otherwise, should forfeit his right to elect for that time, and suffer such other penalty as future laws should direct. On the first of April 1778, an act was passed requiring electors to take an oath of allegiance;\* but the history of the time shows us that this act was strenuously resisted as unwarranted by the constitution, and within a very brief period it was swept from the statute book. The constitution of 1790 followed; it left out the provision of that of 1776 respecting bribery; but in 1799, an act of assembly was passed enacting the omitted provision in the words used in 1776. Disfranchisement under it was never enforced, so far as I know; and it could hardly have been, for the offence was not complete until the vote was given. Since the constitution of 1838 was adopted, the general election law, passed in 1839, enacted that the votes of persons who wagered on the result of any election should be rejected. None of these acts of assembly have been sanctioned by judicial decision, and they are of little value in determining what the constitution means; uniform legislation might aid us in a case of doubt, but there has been no such practice, and the provisions of the constitution are too plain to be disregarded.

\* The first act requiring an oath of allegiance to be taken, as a qualification of an elector, was passed on the 13th June 1777. P. L. 37. See *Respublica v. Gibbs*, 3 Yeates 429.

(Constitutional rights of electors.)

We hold, therefore, that the act of assembly of 4th June 1866 could not disfranchise the plaintiff, and that it did not justify the defendants in refusing his vote. According to the agreement of the parties in the case stated, judgment should have been given for the plaintiff.

Judgment reversed and entered for the plaintiff.

AGNEW, J., and READ, J., dissented.

---

There is no doubt but that the power to regulate the right of suffrage in the states, and to determine who shall or who shall not be voters, belongs exclusively to the states themselves; the constitution of the United States confers no authority upon congress to prescribe the qualifications of electors within the several states that compose the federal union. *Huber v. Reily*, 53 Penn. St. R. 115; *Morrison v. Springer*, 15 Iowa 345; *Spragins v. Houghton*, 3 Illinois 395. It is true, that since this decision, the fifteenth amendment to the constitution has declared that the rights of citizens of the United States to vote, shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude; but this is the only exception to the rule; neither the fifteenth amendment nor the act of congress of the 31st May 1870 (16 Stat. 140), to enforce it, interferes with the laws of the several states which prescribe the qualifications of voters, except so far as they are founded upon the distinction of race, color or previous condition of servitude. *Ex parte McIlwee*, 3 Am. Law Times 251; *McKay v. Campbell*, 2 Abbott U. S. Rep. 120. With this exception, the power of the several states to regulate the right of suffrage, remains intact. Prior to the passage of the fifteenth amendment, and to the adoption of the constitution of Pennsylvania of 1838, it had been solemnly adjudged in that state, that a negro or mulatto was not entitled to the right of suffrage. *Hobbs v. Fogg*, 6 Watts 553. In the opinion delivered in that case, the late Chief Justice Gibson states that the same point had been decided by the high court of errors and appeals in the year 1795; Judge Fox, in the court of common pleas of Bucks county, ruled the same question, in the matter of the contested election of Abraham Fretz, on the 28th December 1837, Pamph.; and the word "white" was formally introduced into the amended constitution of Pennsylvania, in the constitutional convention,

(Constitutional rights of electors.)

by a vote of 77 to 45. In Ohio, the law was the same, but all having more than one-half white blood, were considered white persons, and entitled to the right of suffrage. *Gray v. State*, 4 Ohio 353; *Williams v. School Directors*, Wright 578; *Jeffries v. Ankeny*, 11 Ohio 372; *Thacker v. Hawk*, Ibid. 376; *Anderson v. Millikin*, 9 Ohio St. R. 568. And this, it seems, was a question to be determined by the election officers. *Gordon v. Farrar*, 2 Dougl. 411.

In *Page v. Allen*, 58 Penn. St. R. 338, 347, we have another emphatic declaration that no constitutional qualification of a voter can be abridged, added to or altered by legislation. It is there said by Chief Justice Thompson, that "for the orderly exercise of the right resulting from these qualifications, it is admitted, the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full and free exercise; but this duty and right, inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated; the right must not be impaired by the regulation; it must be regulation merely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excised under the name or pretence of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory; to state, is to prove this position. As a corollary of this, no constitutional qualification of an elector can, in the least, be abridged, added to or altered by legislation, or the pretence of legislation; any such action would, necessarily, be absolutely void and of no effect." It has been held, however, that a constitutional provision that "elections shall be free and equal," does not require that the regulations should be *uniform* throughout the state. *Patterson v. Barlow*, 60 Penn. St. R. 54.

In accordance with the rule laid down in *McCafferty v. Guyer*, it was held by the court of quarter sessions of Philadelphia county, in *Thompson v. Ewing*, 1 Brewst. 103, that an act of assembly which provided that an elector who had removed from his district, within ten days of the election, might vote in the district from which he had removed, was unconstitutional and void. And as a consequence of this decision, it is necessary that an elector who has removed from the place of residence designated in the assessment list, should establish affirmatively that he has not removed from the election district. *Gibbons v. Shep-*



(Registry laws.)

pard, 2 Brewst. 3, 129. In *State v. Adams*, 2 Stew. 239, it was said by the supreme court of Alabama, that no department of the government, nor all of them combined, have the power to divest an individual of the constitutional right of suffrage.

The principle decided in *McCafferty v. Guyer*, has been recognised by the federal legislature, in several cases, in which it has been held that, the constitution having fixed the qualifications of members, no additional ones could be rightfully required by the states. *Barney v. McCreery*, 1 Cong. Election Cases 167; *Turney v. Marshall*, 2 Ibid. 167; *Trumbull's Case*, Ibid. 618.

---

CAPEN *v.* FOSTER.

In the Supreme Judicial Court of Massachusetts.

MARCH TERM 1832.

(REPORTED 12 PICKERING 485.)

[*Registry laws.*]

A statute requiring that, previous to an election, the qualifications of voters shall be proved, and their names placed in a register, is not to be regarded as prescribing a qualification in addition to those which, by the constitution, entitle a citizen to vote, but only as a reasonable regulation of the mode of exercising the right of suffrage, which it is competent for the legislature to make.

Case Stated. The plaintiff was, on the 4th April 1831, an inhabitant of the seventh ward in the city of Boston, and duly qualified, according to the constitution, to vote at an election for governor, &c.; on that day, he tendered his vote to the defendants, who were the election officers of said ward, but they refused to receive the same, on the ground that the plaintiff's name was not borne on the list of qualified voters of the ward. The statute of 1821 provides for a registry of the legal voters of each ward, and makes it the duty of the inspectors to take care that no person shall vote whose name is not borne on the list of

(Registry laws.)

voters. The constitution prescribes the qualifications of voters, but does not require their names to be borne on any list. If the defendants were justifiable in refusing the plaintiff's vote, the plaintiff was to become nonsuit, otherwise, the defendants to be defaulted.

*Blake and Curtis*, for the plaintiff.

*Pickering*, for the defendants.

SHAW, C. J., delivered the opinion of the court. Questions affecting the construction of the constitution of the commonwealth, and the political and civil rights and privileges of the citizens depending on it, are entitled to the fullest and most deliberate consideration, when drawn into judicial discussion; upon a correct decision of these, the security and harmony of our well-balanced system of free and popular government mainly depend.

It has been regarded as a question of doubt and difficulty, whether, upon strict principle, a public officer, who acts honestly and according to the best of his judgment, in the discharge of his duty, and who, through such honest mistake and error of judgment, denies to a citizen his right of voting, should be answerable in an action for damages. But considering the utility of having a plain and perfect remedy, in case of so much importance, and the difficulty which there would be, in bringing questions of this sort to the test of judicial determination, were not each individual citizen permitted to vindicate his own particular right as a voter, before a competent judicial tribunal; and considering that the question of damages will always be in the hands of a jury, who will take care to give slight damages, when the object is principally to settle a really disputed and doubtful right, and when the municipal officers have acted honestly and in good faith, it has been decided, upon great considerations of public policy, that such an action may be sustained. *Kilham v.*

(Registry laws.)

Ward, 2 Mass. 236; *Lincoln v. Hapgood*, 11 Mass. 350. This, therefore, is not now considered an open question.

These decisions, however, apply only to selectmen, whose duty it is, both to determine upon the claim of the voter, and to receive his vote, and who, by refusing to receive his vote, do, at the time, refuse to allow his claim. It, perhaps, may be a different question, whether the same right of action exists against the warden and inspectors of wards, under the city charter, who, as the law stands, are merely ministerial officers, authorized to ascertain the identity of those voters whose names are borne on the lists of voters delivered to them by the mayor and aldermen, and to receive the votes of such persons; by the terms of the act, they have no authority to add any name to the list, or to receive the vote of any person whose name is not on the list, or to consider or determine on the qualifications of any person offering himself as a voter. It may, therefore, be still considered as an unsettled question, under the peculiar organization of the city of Boston, whether the remedy of a citizen, who has been deprived of his right of voting, is by an action against the warden and inspectors, or the mayor and aldermen, or against either of them respectively, as it shall appear, upon the circumstances of each particular case, that the loss of such right has been occasioned by the failure of the one or the other, in the discharge of their respective and appropriate duties.

But the present case has been argued upon ground more general, and entirely independent of the particular organization of the city. The clause in section 24 of the act incorporating the city provides that, prior to every election, it shall be the duty of the mayor and aldermen to make out lists of all the citizens of each ward, qualified, &c., in the manner in which the selectmen and assessors of towns are required to make out similar lists of voters; and it shall be the duty of the mayor and aldermen to deliver such list to the clerk of the ward, to be used by the warden and inspectors, at such election, and no person shall be

(Registry laws.)

entitled to vote at such election, whose name is not borne on such list; and to prevent fraud and mistakes, it is made the duty of the inspectors, to take care that no person shall vote at such election whose name is not borne on the list of voters. These provisions, except so far as they are modified, in order to conform to the peculiar organization of the city, are substantially like those of the general law regulating elections. Stat. 1822, ch. 104, § 2. This provides the manner in which selectmen are required to make out and publish lists of the qualified voters; it then requires that the selectmen or moderator shall be provided with a complete list as aforesaid, at such election, and no person shall vote at any election, whose name shall not have been previously placed on said list. In the particular provision, in regard to which the validity of the law is now called in question, viz. that no person shall vote at an election, whose name is not previously placed on the list of voters, the mode of regulating elections in the city, and in all the towns of the commonwealth, is precisely the same.

It appears by the facts agreed, in the present case, that the name of the plaintiff was not borne on the list of voters, at the time his vote was rejected, and it does not appear that he had previously examined the lists, or applied to have his name inserted on the lists. By the plain and express terms of the law, the plaintiff, under the circumstances, was prohibited from voting; by asserting the right, therefore, the plaintiff puts in issue the validity of these provisions of the law; and the case of the plaintiff is put upon the ground, that such a provision is a restraint upon the right of voting, inconsistent with the privileges secured by the constitution to the citizens; that these constitutional privileges are above and beyond the control of the legislative power, and that all such laws are, therefore, unconstitutional, inoperative and void. This is the question which the court is now called upon to decide.

On the part of the plaintiff, it is contended, that the

(Registry laws.)

constitution itself has provided the qualifications of voters; that the law in question prescribes a new and additional qualification; that, as such, it operates as a restraint upon the larger privilege allowed by the constitution itself, which cannot be done by an act of legislation. On the other hand, it is argued, that the right of suffrage being secured by the constitution to persons having certain specified qualifications of age, sex, residence, property and contribution to public burdens, it was for the constitution itself either to direct in detail the time, place and manner in which this constitutional right should be exercised, or to leave this to be regulated by law; that so far as this is done by the constitution itself, in plain terms or by necessary implication, it is binding and conclusive, but where it is not so done, it is competent for the legislature to provide for the exigency, by a law acting uniformly throughout the commonwealth. And this court is of opinion, that in all cases, where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, in a prompt, orderly and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself.

A familiar instance of the case of providing by law for the exercise of one of the most important rights of election, is found in one of the earliest acts passed under the constitution. If there be any one portion or member of our frame of government more important than another, it is surely that which provides for an equal representation of the people in the house of representatives; and yet the constitution made no provision in regard to the time and place

(Registry laws.)

at which meetings should be held, how they should be called or regulated, or how the result should be ascertained; it fixed the qualifications of voters with precision, and left all the rest to be regulated by law. Accordingly, within a few months after the adoption of the constitution, an act was passed, reciting this part of it, and that no provision was made for convening the voters, for regulating the meetings, or for making returns of the persons elected, and it then proceeds to make the needful regulations upon this subject: Stat. 1780, ch. 26, since repealed. Here it is manifest, that although the qualifications of electors of representatives were prescribed by the constitution, yet, without a provision by law for regulating the exercise of that right, the constitution itself would be nugatory; it cannot be doubted, that this is a just exercise of the power of the legislature, to provide for the exercise of one of the most important rights of suffrage, and without which the qualified electors would be unable to exercise the right itself, to any useful or effectual purpose.

Another obvious exercise of the same power is found in Stat. 1788, ch. 31, § 3, which provides, that it shall not be lawful for the selectmen or assessors of any town, district or plantation, presiding at a meeting for either of the elections therein recited, including those of governor and lieutenant-governor, senators and representatives, electors of president and vice-president of the United States, and representatives to congress, to receive any vote, unless delivered in writing by the voter in person. As to many of these elections, particularly that of representatives, the constitution is silent upon the question, whether the votes shall be given personally or by proxy, *vivâ voce* or by ballot; but for this law, all qualified voters might claim the right of voting *vivâ voce* or by proxy. But we think it cannot be doubted, that this is a just exercise of legislative power, providing an easy and reasonable mode of exercising the constitutional right, and one calculated to prevent error and fraud, to secure order and

(Registry laws.)

regularity in the conduct of elections, and thereby give more security to the right itself.

That part of the constitution which provides for the election of senators and counsellors, goes more into detail; it directs that a meeting of the inhabitants of each town shall be held on the first Monday of April, annually (since altered to another day), to be called and warned as therein required, and prescribes the qualifications of voters; it then goes on to provide, that the selectmen of the several towns shall preside at such meetings impartially, and shall receive the votes of all the inhabitants of such town present and qualified to vote for senator. Whether under the provision that the selectmen shall preside, and receive the votes of all qualified voters, such selectmen are made constitutionally judges of the qualifications of the voters, or whether it would be competent for the legislature to vest that authority in some other body, it is not necessary now to decide; it seems, that sometimes the legislature have entertained the opinion, that it was competent for them to provide by law for another mode of deciding on these qualifications, by vesting the authority in the towns, or in the assessors. But taking it for granted, that the authority of judging of the qualifications of voters, is, by this provision of the constitution, vested in selectmen of towns, as long as that form of municipal organization remains, which seems the more probable and sound construction of the constitution, still, the constitution is wholly silent in regard to the time, place and manner in which such selectmen shall receive evidence of the qualifications of voters, and how the result shall be ascertained, and the evidence of it manifested and preserved.

The right of any individual person, claiming the privilege of voting, may involve an inquiry into the facts of citizenship, sex, age, domicil within the commonwealth, domicil within the town or district, the payment of taxes, exemption by law from the payment of taxes, and the fact of his being a pauper, or under guardianship, or other-

(Registry laws.)

wise. All these are questions of fact, open to proof of various kinds, and sometimes, though rarely, requiring considerable research and investigation. Is there anything in the above-recited provision of the constitution which requires the selectmen so go through this investigation, during the progress of the polling, and whilst many other citizens, whose right is unquestioned, and proved by their names being previously entered on the list, are waiting to give in their ballots and retire? There is no express requirement, and we think there is no implication, arising either from the terms of the constitution, or from the nature and purposes of the right of voting, which obliges the selectmen to perform this duty, whilst in the actual performance of other positive duties, required by the express direction of the constitution, and in the careful, exact and prompt performance of which, the public, the whole body of qualified voters, have a deep interest.

The constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must, at some time, be had, by those who are to decide on them. The time and labor necessary to complete these investigations must increase, in proportion to the increased number of voters; and indeed, in a still greater ratio, in populous commercial and manufacturing towns, in which the inhabitants are frequently changing, and where, of necessity, many of the qualified voters are strangers to the selectmen. If, then, the constitution has made no provision in regard to the time, place and manner in which such examination shall be had, and yet, such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent for the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the



(Registry laws.)

exercise of that right.\* And this court is of opinion, that the provision in the general law regulating elections, and that in the act incorporating the city, which require that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, that their names shall be entered upon an alphabetical register or list of voters, is highly reasonable and useful, calculated to promote peace, order and celerity in the conduct of elections, and as such to facilitate and secure this most precious right to those who are, by the constitution, entitled to enjoy it; that it cannot be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting, which it was competent to the legislature to make; and therefore, that these legal enactments, not being repugnant to the constitution, are valid and binding laws, to which both voters and presiding officers at elections, are authorized and bound to conform.

In the manner in which these lists are framed, effectual care seems to be taken to secure the rights of electors. The lists are first to be prepared by the collectors of taxes, and submitted to the selectmen, who are to revise and publish the same for the inspection of all interested; they are to be in session a sufficient length of time, shortly before the election, and for an hour, at least, on the day of meeting, and before the opening of the meeting, to receive evidence of the qualifications of those whose names may have been omitted; nothing, therefore, but the carelessness or neglect of the voter himself, or some accident not attributable to the law, or the officers who are to execute it, can deprive him of the power of proving his right and exercising his privilege; and against these it would be difficult,

\* The discretion of determining what is such reasonable regulation is one of those powers which ought never to be reposed in an elective judiciary, holding for a limited term, and dependent for their continuance in office on a partisan endorsement.

(Registry laws.)

either by legal or constitutional provisions, entirely to guard.

It was contended in the argument for the plaintiff, that the act incorporating the city of Boston, and providing for the mode of conducting elections therein, makes no provision for the publication of the lists of voters, prior to each election, so that it is impossible for a voter to know whether his name is borne on the list or not, and that, without any neglect of his own, his right of voting may be defeated, and therefore, that this provision is not a reasonable regulation in regard to the exercise of the right. But we think that the law is not obnoxious to this objection; the act of incorporation (Stat. 1821, ch. 110, § 24) provides that, prior to every election of city officers, or of any officers under the government of the United States, or of this commonwealth, it shall be the duty of the mayor and aldermen to make out lists of all the citizens of each ward, qualified to vote in such election, in the manner in which selectmen and assessors of towns are required to make out similar lists of voters, &c. The amendment of the constitution in 1820, had previously invested the general court with authority to erect city governments, to grant them powers and privileges not repugnant to the constitution, to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise, for the election of officers under the constitution, and the manner of returning the votes given at such elections. It was, therefore, manifestly within the power of the legislature to provide for the holding of elections in wards.

The act had previously provided (§ 12) that all the powers of the selectmen, either under general or special laws, should be vested in the mayor and aldermen. We have previously seen that it was one of the powers incident to the office of selectmen, to make out lists of voters for their respective towns, previously to each election, and to determine upon the qualifications of voters; there was, therefore, a manifest

(Registry laws.)

fitness and propriety in giving this power to the mayor and aldermen, upon the incorporation of the city. It had a manifest tendency to promote the purity and regularity of elections, that this authority should be vested in one body, for the whole city, instead of being entrusted to the officers of wards; it would tend to promote uniformity in the rules of evidence and of decision upon the claims of voters, and to prevent fraudulent attempts to vote in different wards. To accomplish these objects, however, it was still more necessary, than in towns, that the lists should be closed before the polling commenced. Still, if the provision of this law is such, as to afford the voter no opportunity to know, seasonably, whether his name is on the list or not, it would constitute a serious objection to its validity; but, as already said, we think it is not open to this objection. By the provision already cited, the mayor and aldermen are to make out lists of voters for each ward, in the manner in which selectmen and assessors of towns are required to make out similar lists of voters. This act was passed before the general act, already cited, regulating elections; but, at the time the act incorporating the city was passed, two other acts were in force, making similar provisions in regard to the making out lists of voters, but dividing the duty between the selectmen and assessors. Stat. 1802, ch. 116; Stat. 1813, ch. 68.

It may be a question upon the construction of the clause cited from the city charter, whether, in referring to the manner in which lists of voters are required to be made by selectmen and assessors of towns, it looked forward to such laws as should, from time to time, be passed upon this subject, or whether it regarded the duties of selectmen and assessors, as they were then established by law. To the purposes of the present inquiry, the point is wholly immaterial, because, by the laws as they then stood, and by the act passed in the following year, it was specially required that the lists should be posted up a certain time previous to the election, and that the selectmen and assessors should be in

(Registry laws.)

session, immediately before or on the day of the election, so as to give to every voter the means of knowing whether his name was borne on the list, and opportunity to place it there, if omitted. And we are of opinion, that by this reference to the laws then in force, and by requiring the mayor and aldermen to make up their lists of voters in the manner in which assessors and selectmen of towns are required to make similar lists, all the reasonable and beneficial provisions of those laws prescribing the duties of the officers, and securing the privileges of the voters, were adopted and incorporated in the city charter and became binding and obligatory upon the mayor and aldermen, as effectually as if they had been re-enacted and extended to them in terms. All the remarks, therefore, made before in reference to the reasonableness of these regulations of the right of voting in towns, apply with equal force in regard to the clause in the act of incorporation, regulating the right of voting within the city.

Judgment of nonsuit.

---

The power to enact registry laws so as to ensure the orderly exercise of the right of suffrage, within the limits prescribed in *Capen v. Foster*, is now generally admitted; that is, they must be reasonable and uniform regulations, and not, under color of regulating, subvert and injuriously restrain the right itself. But the practical difficulty has been, that a partisan elective judiciary have ever been found ready to sustain a law enacted in favor of their own political friends, as a reasonable regulation, however vexatious and unreasonable it may present itself to an impartial and candid mind, and however subversive it may be of the rights of the minority. This is one of the grand defects in our political system, the vesting of discretionary power in political cases, in an elective judiciary, with a limited tenure of office.

In *Page v. Allen*, 58 Penn. St. R. 338, the doctrine of the principal case was affirmed by the supreme court of Pennsylvania; a registry law was there held to be unconstitutional on the ground that it impaired the free exercise of the right of suffrage, as conferred by the constitution.

(Registry laws.)

It is there said by Chief Justice Thompson, delivering the opinion of the court, that "for the orderly exercise of the right resulting from these (constitutional) qualifications, it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required to ensure its full and free exercise ; but this duty and right inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation ; it must be regulation purely, not destruction ; if this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excinded, under the name or pretence of regulation, and thus would the natural order of things be subverted, by making the principal subordinate to the accessory ; to state, is to prove this position. As a corollary of this, no constitutional qualification of an elector can in the least be abridged, added to or altered by legislation, or the pretence of legislation ; any such action would, necessarily, be absolutely void and of no effect. We hold, therefore, what indeed was not expressly denied, that no regulation can be valid, which would have the effect to increase the district or state residence, prior to the time of an offer to exercise the right of an elector, or which would impose other or additional taxation or assessments, than those provided in the constitution." And yet, the same court, in *Patterson v. Barlow*, 60 Penn. St. R. 54, sustained a registry law, which was as subversive of the rights of the minority, as it is possible to imagine ; and held, at the same time, that the constitutional provision that "elections shall be free and equal," did not require that the regulations should be *uniform* throughout the state ; but that the legislature had power to impose more severe restriction upon the exercise of the elective franchise by a portion of the inhabitants, than upon others, in their discretion ; a doctrine plainly destructive of the rights of minorities which the constitution was intended to preserve to them ; from this judgment, Thompson, C. J., and Sharswood, J., dissented.

Mr. Justice Agnew, who was a member of the convention of 1838, based his argument upon the fact, that when the 3d article of the constitution was under consideration, Mr. Sterigère offered an amendment "that all election laws shall be uniform throughout the state, and no greater or other restrictions shall be imposed on the electors, in any city, county or district, than are imposed on the electors of every other city,

## (Registry laws.)

county or district ;" and that this amendment was rejected, many of the political friends of Mr. Sterigère voting in the majority. But the learned judge *omitted* to state, that the democratic members of the convention who voted with the majority, contended in the debate that the amendment was not only out of place, but was unnecessary, inasmuch as the clause in the bill of rights, that "elections shall be free and equal," covered the whole ground, and rendered unconstitutional the Philadelphia registry law of 1836. See 3 Debates in Convention, 29, 32-5, 50, 57, 63-4, 78, 81-2.

The constitution of Maryland expressly empowers the legislature to pass a registry law ; in that state, the register is evidence of the qualifications of the voter, and no person can be admitted to vote, unless his name appear thereon. *Hendesty v. Taft*, 23 Md. 512 ; *Anderson v. Baker*, *Ibid.* 531 (ante 27). So also in Louisiana, *Auld v. Walton*, 12 La. An. 129. In Missouri, *State v. Bond*, 38 Mo. 425 ; *Ensworth v. Albin*, 46 Mo. 453. And in New York, *United States v. Quin*, 3 Am. L. T. Rep. 182. In Michigan, so strictly is the registry law enforced, that it is held, that where votes were cast by legal voters, who had not been registered, simply because there was no acting board of registration, and therefore, it was impossible for them to comply with the provisions of the law, such ballots were illegal and would not avail the candidate for whom they were given. *People v. Kopplekom*, 16 Mich. 342. A doctrine utterly subversive of the freedom of the elective franchise, because it puts the power in the hands of unscrupulous election officers, of so manipulating the preliminary proceedings as to make the return of a particular candidate a foregone conclusion. In Wisconsin, it is held, that where there was no registry of the voters of a town, and none of the persons who voted therein furnished the affidavit required by law to entitle the vote of an unregistered person to be received, the entire poll must be rejected. *State v. Stumpf*, 23 Wis. 630 ; *State v. Hilmantel*, 21 Wis. 566. A more just and equitable doctrine, inasmuch as it leaves it in the power of the voter himself, to supply the defect of a previous registry. In Missouri, an election is invalid, unless preceded by a prior registration. *State v. Albin*, 44 Mo. 346.

For the practical points which have arisen under the registry laws of the states, see *Conway v. Aldermen*, 2 Brewst. 134 ; *Anon.*, *Ibid.* 138 ; *Commonwealth v. Cuncannon*, 3 *Ibid.* 344 ; *Auld v. Walton*, 12 La. An. 129 ; *People v. Board of Registration*, 15 Mich. 156 ; *State v. Cook*, 41 Mo. 593 ; *Boren v. Smith*, 1 Chicago Leg. News 170.

## EX PARTE MCILLWEE.

Circuit Court of the United States for West Virginia.

SEPTEMBER 1870.

(REPORTED 3 AMERICAN LAW TIMES 251.)

[*Federal qualifications.*]

The act of congress of 31st May 1870 (16 Stat. 140), does not interfere with the laws of the several states, which prescribe the qualifications of voters, except so far as they are founded upon the distinction of race, color or previous condition of servitude.

Habeas corpus, before Judge Bond, at chambers.

BOND, J. It appears from the return and the evidence in this case, that the petitioner is one of the persons appointed under the laws of the state of West Virginia to register those entitled to vote under the election laws of that state. A certain Winfield Scott Alkire, a white citizen of West Virginia, made application, on the 5th day of August last, to the petitioner, to be registered, and his application was refused, on the ground that he was not qualified to vote under the laws of the state, by reason of his adherence to, or participation in the late rebellion. The petitioner was, therefore, on the affidavit of said Alkire, arrested and brought before a commissioner of the United States, for a supposed violation of the act of congress approved 31st May 1870, and by said commissioner, in default of bail, was committed to answer at the next term of the district court.

It appears to me, that this case does not come within the purview of the statute in question. That it was not the intention of congress to abolish the laws of the several states which prescribe the qualifications of voters, or even alter them, except so far as they were founded upon the distinction of race, color or previous condition of servitude,

(Federal qualifications.)

is sufficiently evident, from the words of the first section of this statute, which declare it to relate to "all citizens of the United States who are or shall be otherwise qualified by law to vote." It cannot be doubted, that the meaning of this language is, that these citizens shall be qualified to vote by the law of the state or territory in which they offer to poll; that these persons, thus "otherwise qualified," shall vote, without distinction of race, color or previous condition of servitude, is the purpose and intent of the statute. It was clearly the duty imposed on the petitioner to inquire into the qualifications of the applicant, and if he found him "otherwise qualified," he was to register him, without distinction of race, color or previous condition of servitude, under the penalty of the act of congress.

The 3d section of this act of congress relates to those citizens, otherwise qualified, who have not been able, by reason of the "wrongful act or omission aforesaid," to do the prerequisite act which entitles the citizen to vote. There is no mention of any "wrongful act or omission," in the 3d section itself; and every rule of construction requires that reference should be had to the previous sections, where we find the "wrongful act or omission," to be, the making, among citizens "otherwise qualified," a distinction on account of race, color or previous condition of servitude. It is not pretended, that the petitioner refused the application of Alkire on this account, and therefore, he is not guilty of the "wrongful act or omission," which makes him amenable to the punishment prescribed in these sections.

The 22d section of the act under consideration relates to the "officers of any election at which any representative or delegate in the congress of the United States shall be voted for." It is not alleged, nor is it true, that there was any election of the kind being held, of which election the petitioner was an officer; he was a mere subordinate officer of registration, from whose judgment there was an appeal, by the laws of the state, to a board of



(Federal qualifications.)

registration in review. The petitioner, in my opinion, must be discharged, because it does not appear that he is guilty of the violation of the act of congress with which he is charged; and that for the reason that, for his judgment of the qualification of the applicant for registration, under the laws of West Virginia, he is not answerable in a court of the United States.

Petitioner discharged.

---

The same point was decided by Judge Deady, in the district court of the United States for the district of Oregon, in the case of *McKay v. Campbell*, 2 Abhott U. S. Rep. 120, where it was determined, that in an action to recover a penalty under the 2d section of the act of 1870, it must be averred, that the plaintiff was a citizen of the United States, and otherwise qualified to vote at the time and place mentioned; and that the defendant refused, or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector; and that such refusal or omission was on account of the race, color or previous condition of servitude of the plaintiff. And in this connection the judge remarked: "I know it may be said, with much probability, that disingenuous judges of election, who are violently averse to and prejudiced against the amendment and the act, may refuse or omit to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the act, but really and in fact, on account of his race, color or previous condition of servitude; but this is a question of fact, and if the evidence be sufficient, the jury will be bound to disregard the pretences of the defendant, and find according to what appears to have been the fact. Besides, to prevent a failure of justice on this account, it may be necessary and proper to hold, in this class of cases, as in many others, that slight proof on the part of the plaintiff, as to the reason of the defendant's refusal or omission, is sufficient to throw the burden of proof, in this respect, upon the latter."

On the other hand, Judge Jackson, in a charge to the grand jury, at the August Term of the district court of the United States for the district of West Virginia, took the ground that the act of congress protects

(Federal qualifications.)

all citizens, without distinction, in the right of suffrage, and that it was not necessary that they should be denied such right, on account of race, color or previous condition of servitude. He says—"the last clause of the 14th amendment to the constitution of the United States provides that no one shall be denied the equal protection of the laws; in framing this act, congress must have had this provision of the constitution in view; it cannot be supposed that it would escape their attention; it must, therefore, be conceded, that all citizens are, under the fundamental law of the land, entitled to equal privileges, and the equal protection of the law; the latter right is embraced in the very words of the amendment; it is incredible to suppose that congress intended, by the passage of this act, to do so vain a thing, as to enact a law purely for the benefit of one class of citizens, to the manifest neglect and prejudice of another, thus attempting, by legislation, to deprive them of the equal privileges and the equal protection of the law, as guarantied by the 14th amendment. If such be its true construction, it would be clearly in conflict with this amendment to the constitution of the United States." 3 Am. L. Times 254-5. And this appears to be the opinion of Mr. Justice Bradley, of the supreme court of the United States, in the case of the Live-stock Dealers' and Butchers' Association *v.* Crescent City Live-stock Landing and Slaughter-house Co., 1 Abbott U. S. Rep. 388, 405.

## HUBER v. REILY.

In the Supreme Court of Pennsylvania.

MAY TERM 1866.

(REPORTED 53 PENNSYLVANIA STATE REPORTS 112.)

[*Disfranchisement.*]

Congress may inflict, as a punishment for the crime of desertion, the forfeiture of the delinquent's citizenship of the United States; and if a state constitution prescribe citizenship as one of the qualifications of its electors, such person is no longer a legal voter under the state laws.

But such forfeiture is only incurred by the delinquent, after trial by a court-martial and a sentence, duly approved, adjudging the forfeiture.

Election officers have no power to reject the vote of an elector, on the ground that he is a deserter from the military service of the United States, in the absence of a regular conviction of the offence.

Error to the judgment of the court of Common Pleas of Franklin county, on a case stated, in which Henry Reily was plaintiff and Benjamin Huber, defendant.

The plaintiff was a citizen of the township of Hamilton, in the county of Franklin, and was liable to military service in the army of the United States; on the 19th July 1864, he was regularly drafted to fill the quota of the township of Hamilton, under a requisition of the President of the United States; he was regularly served with notice, but refused to report, and never did report for muster; he never furnished a substitute; nor did he ever enter into the military service of the government; but was duly registered by the provost-marshal, as a deserter. The plaintiff was a qualified elector of Hamilton township, under the constitution and laws of Pennsylvania; the defendant was judge of the general election in that township, on the 10th October 1865; the plaintiff, on that day, tendered his ballot to the board of election officers of said township, which the defendant refused to receive, on the

(Disfranchisement.)

ground that the plaintiff was a deserter from the military service of the United States. It was agreed that, if the plaintiff was entitled to vote, notwithstanding the act of congress of 3d March 1865, then judgment should be entered in his favor for the sum of one dollar.

The court below gave judgment for the plaintiff, on the case stated, which was assigned for error.

*McClure & Stewart* and *Stambaugh & Gehr*, for the plaintiff in error.

*Kimmell, Brewer, Stenger* and *Sharpe*, for defendant in error.

STRONG, J., delivered the opinion of the court. The act of congress under which the defendant below justifies his refusal to receive the vote of the plaintiff, is the one approved on the 3d day of March 1865. The 21st section is the only one applicable to this case, and it is as follows: "And be it further enacted that, in addition to the other lawful penalties of the crime of desertion from the military or naval service, all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report themselves to a provost-marshal, within sixty days after the proclamation hereafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship, and their rights to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any right of citizens thereof; and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section." This is followed by a clause

(Disfranchisement.)

authorizing and requiring the president to issue his proclamation, setting forth the provisions of this section; and we know judicially that this was done on the 11th of March 1865.

The act of congress is highly penal; it imposes forfeiture of citizenship, and deprivation of the rights of citizenship, as penalties for the commission of a crime; its avowed purpose is, to add to the penalties which the law had previously affixed to the offence of desertion from the military or naval service of the United States, and it denominates the additional sanctions provided, as penalties; such being its character, it is, under the well-known rule of law, to receive a strict construction in favor of the citizen.

The constitutionality of the act has been assailed on three grounds: the first of these is, that it is an *ex post facto* law, imposing an additional punishment for an offence committed before its passage, and altering the rules of evidence, so as to require different and less proof than was required at the time of the perpetration of the crime: the second objection is, that the act is an attempt by congress to regulate the right of suffrage in the states, or to impair it: and the third objection is, that the act proposes to inflict pains and penalties upon offenders, before and without a trial and conviction by due process of law, and that it is, therefore, prohibited by the bill of rights. In the view which we take of this case, and giving to the enactment the construction which we think properly belongs to it, it is unnecessary to consider, at length, either of these objections to its constitutionality.

It may be insisted, with strong reason, that the penalty of forfeiture of citizenship, imposed upon those who had deserted the military or naval service prior to the passage of the act, is not a penalty for the original desertion, but for persistence in the crime; for failure (in the language of the statute) to return to said service, or to report to a provost-marshal, within sixty days after the issue of the

president's proclamation. If this be so, the act of congress is, in no sense, *ex post facto*, and it is not, for that reason, in conflict with the constitution; its operation is entirely prospective. If a drafted man owe service to the federal government, every new refusal to render the service, may be regarded as a violation of public duty, a public offence for which congress may impose a penalty; and as it is the duty of every court to construe a statute, if possible, *ut res magis valeat, quam pereat*, that construction of this act must be adopted, which is in harmony with the acknowledged powers of congress, and which applies the forfeiture of citizenship to the new offence, described as failure to return to service, or to report to the provost-marshal.

The second objection also assumes more than can be conceded. It is not to be doubted, that the power to regulate suffrage in a state, and to determine who shall and who shall not be a voter, belongs exclusively to the state itself; the constitution of the United States confers no authority upon congress, to prescribe the qualifications of electors, within the several states that compose the federal union. Congress is, indeed, empowered to make regulations for the time, place and manner of holding elections for senators and representatives, or to alter those made by the legislature of a state (except those in relation to the places of choosing senators), but here its power stops; the right of suffrage at a state election, is a state right, a franchise conferrable only by the state, which congress can neither give nor take away. If, therefore, the act now under consideration is, in truth, an attempt to regulate the right of suffrage in the state, or to prescribe the conditions upon which that right may be exercised, it must be held unwarranted by the constitution.

In the exercise of its admitted powers, congress may doubtless deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen of a state, even the right of suffrage; but this is a different thing from taking away or impairing the right itself. Under the laws of the

---

(Disfranchisement.)

federal government, a voter may be sent abroad in the military service of the country, and thus deprived of the privilege of exercising his right; or a voter may be imprisoned for a crime against the United States; but it is a perversion of language, to call this impairing his right of suffrage. Congress may provide laws for the naturalization of aliens, or it may refuse to provide such laws; its action or non-action may thus determine whether individuals shall or shall not become citizens of the United States. And I cannot doubt that, as a penalty for crime against the United States, congress may impose upon the criminal, forfeiture of his citizenship of the United States; disfranchisement of a citizen, as a punishment for crime, is no unusual punishment. *Barker v. People*, 20 Johns. 457. If, by the organic law of a state, citizens of the United States only are allowed to vote, the action or non-action of congress may thus, indirectly, affect the number of those entitled to the right of suffrage; yet, after all, the right is one which its possessor holds as a citizen of a state, secured to him by the state constitution, and to be held on the terms prescribed by that constitution alone. But it is not a correct view of the act of congress now before us, to regard it as an attempt to override state constitutions, or to prescribe the qualifications of voters; the act makes no change in the organic law of the state; it leaves that, as before, to confer the right of suffrage as it pleases. The enactment operates upon an individual offender, punishes him for violation of the federal law, by deprivation of citizenship of the United States, but it leaves each state to determine for itself whether such an individual may be a voter; it does no more than increase the penalties of the law upon the commission of crime; each state defines for itself what shall be the consequence of the infliction of such penalties; and with us, it is still our own constitution which restricts the right of suffrage, and confers it upon those only who are inhabitants of the state and citizens of the United States.

The third objection against the validity of the act of congress, would be a very grave one, if the act does, in reality, impose penalties before and without a conviction by due process of law. The 5th article of the amendments to the constitution ordains that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law." The 6th article secures to the accused, in all criminal prosecutions, certain rights, among which are a speedy and public trial by a jury of the vicinage, information of the nature and cause of the accusation, face to face presence with the witnesses against him, compulsory process for his own witnesses, and the assistance of counsel. The spirit of these constitutional provisions is, briefly, that no person can be made to suffer for a criminal offence, unless the penalty be inflicted by due process of law; what that is, has been often defined, but never better than it was, both historically and critically, by Judge Curtis of the supreme court of the United States, in *Murray v. Hoboken Land and Improvement Co.*, 18 How. 280; it ordinarily implies and includes a complainant, a defendant and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding.

It must be admitted, there are a few exceptional cases; prominent among these are summary proceedings to recover debts due to the government, especially taxes, and sums due by defaulting public officers. But I can call to mind no instance in which it has been held, that the ascertainment of guilt of a public offence, and the imposition of legal penalties, can be in any other mode than by



(Disfranchisement.)

trial according to the law of the land, or due process of law, that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself, that a judge of elections, or a board of election officers constituted under state laws, is such a tribunal; I cannot think they have power to try criminal offenders, still less to adjudge the guilt or innocence of an alleged violator of the laws of the United States; a trial before such officers, is not due process of law for the punishment of offences, according to the meaning of that phrase in the constitution. There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has received a certificate of naturalization; these things pertain to the ascertainment of a political right. But whether he has been guilty of a criminal offence, and has, as a consequence, forfeited his right, is an inquiry of a different character; neither our constitution nor our law has conferred upon the judges of election any such judicial functions. They are not sworn to try issues in criminal cases; they have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal; even if they were to assume jurisdiction of the offence described in the act of congress, and proceed to try whether the applicant for a vote had been duly enrolled and drafted, whether he had received notice of the draft, whether he had deserted and failed to return to service, or failed to report to a provost-marshal, and whether he had justifying reasons for such failure, and if, after such trial, they were to decide that he had not forfeited his citizenship, all this would not amount to an acquittal; it would not protect him against a subsequent similar accusation and trial, would not protect him against trial and punishment by a court-martial. Surely, that is no trial by due process of law, the judgment in which is not final, decides nothing, but leaves the accused exposed

to another trial in a different tribunal, and to the imposition, by that other tribunal, of the full punishment prescribed by law.

Moreover, it is not in the power of congress to confer upon such a tribunal, which is exclusively of state creation, jurisdiction to try offences against the United States. Notwithstanding the decision in *Buckwalter v. United States*, 11 S. & R. 193, which was an action for penalties declared to be recoverable as other debts, the doctrine seems a plain one, that congress cannot vest any of the judicial power of the United States in the courts of any other government or sovereignty. *Martin v. Hunter*, 1 Wheat. 304, 330; *Ely v. Peck*, 7 Conn. 242; and *Scoville v. Canfield*, 14 Johns. 338. And clearly, if this be so, congress cannot make a board of state election officers competent to try whether a person has been guilty of an offence against the United States, and if they find him guilty, to enforce a part of the prescribed penalty.

If, therefore, the act of 3d March 1865 really contemplates the infliction of its prescribed penalty, or any part of it, without due process of law, or if it attempts to confer upon the election officers of a state, the power to determine whether there has been a violation of the act incurring the penalty, and to enforce the penalty, or any part of it, it may well be doubted, whether it is not transgressive of the authority vested in congress by the constitution. But such is not the fair construction of the enactment. It is not to be presumed that congress intended to transgress its powers, and especially is this true, when the act admits of another construction entirely consistent with all the provisions of the constitution.

What, then, is its true meaning? As already observed, forfeiture of citizenship is prescribed as a penalty for desertion, an additional penalty, not for an offence committed before the passage of the act, but for continued desertion, and failure to return or report. It is not a new consequence of a penalty, but it is an integral part of the thing

(Disfranchisement.)

itself; nor is it the whole; it is added to what the law had previously enacted to be the penalty of desertion, as imprisonment is sometimes added to punishment by fine. It must have been intended, therefore, that it should be incurred in the same way, and imposed by the same tribunal that was authorized to impose the other penalties for the offence. It would be very absurd, to suppose that two trials and two condemnations for one crime were intended, or that it was designed that a criminal might be sentenced in one court to undergo a part of the punishment denounced by the law, and be punished in another court by the imposition of the remainder. The law, as it stood when the act of 1865 was passed, had provided a tribunal in which alone the crime of desertion could be tried, and by which alone the penalties for desertion could be inflicted. The consequences of conviction may be noticed in other courts, but the tribunal appointed by the law for that purpose is the only one that can determine whether the crime has been committed, and adjudge the punishment.

The act of 3d March 1865 is not to be considered apart from the other legislation respecting the crime of desertion; it is one of a series of acts pertaining to the same subject-matter; it must, therefore, be interpreted with them all in view; this is an admitted rule of statutory construction. So long ago as *Rex v. Loxdale*, 1 Burr. 447, Lord Mansfield said, when speaking of acts of parliament, that all which relate to the same subject, notwithstanding some of them may be expired, or not noticed, must be taken to be one system, and construed consistently. So, Chancellor Kent, in the first volume of his Commentaries, 463-4, said, "it is to be inferred, that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

In looking through the numerous acts of congress relating to desertion from the military or naval service, it is

plainly to be seen, that they all contemplate a regular trial and conviction prior to the infliction of any penalty; and courts-martial are constituted for such trials. The 20th article of war, enacted on the 10th April 1806 (1 Bright. Dig. 75), is in these words: "all officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be *convicted* of having deserted the same, shall suffer death, or such other punishment as, by *sentence of court-martial*, shall be inflicted." Other enactments have been made, at different times, respecting the punishments to be inflicted for the offence; the punishment of death, in time of peace, was abolished in 1830; corporal punishment by stripes was abolished by the act of 16th May 1812; and by the act of 2d March 1833, that section of the repealing act was itself repealed, "so far as it applies to any enlisted soldiers *who shall be convicted by a general court-martial of the crime of desertion.*" By the act of 11th January 1812, an additional penalty was prescribed for desertion, and it was declared, that each soldier "shall and may be tried by a court-martial and punished" (1 Bright. Dig. 89). The 13th section of the act of 3d March 1863, which declared that any person failing to report, after due service of notice that he had been drafted, shall be deemed a deserter, enacted that such a person "shall be arrested by the provost-marshal, and sent to the nearest military post *for trial by court-martial*, unless, upon proper showing that he is not liable to military duty, the board of enrolment shall relieve him from the draft."

All these acts of congress manifestly contemplate trial for desertion in courts-martial, and the infliction of no punishment or forfeiture, except upon conviction and sentence in such courts. The act of 1806 provided for general courts-martial, and made minute and careful regulations for their organization, for the conduct of their proceedings, and for the approval or disapproval of their sentences; subsequent acts made some changes, but they have not restrained the jurisdiction, nor diminished the powers of

(Disfranchisement.)

such courts. It is to such a code of laws, forming a system devised for the punishment of desertion, that the 21st section of the act of 3d March 1865 was added; it refers plainly to pre-existing laws; it has the single object of increasing the penalties, but it does not undertake to change or dispense with the machinery provided for punishing the crime. The common rules of construction demand that it should be read as if it had been incorporated with the former acts. And if it had been, if the act of 1806 and its supplements had prescribed that the penalty for desertion, or failure to report within a designated time after notice of draft (which the act of 1865 declares desertion), should be punished, on conviction of the same, with forfeiture of citizenship and death, or, in lieu of the latter, such other punishment as, by the sentence of a court-martial, may be inflicted, would any one contend, that any portion of this punishment could be inflicted, without conviction and sentence? Assuredly not; and if not, so must the act of 1865 be construed now. It means, that the forfeiture which it prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by a court-martial, and sentence approved; for the conviction and sentence of such a court there can be no substitute; they alone establish the guilt of the accused, and fasten upon him the legal consequences. Such, we think, is the true meaning of the act, a construction that cannot be denied to it, without losing sight of all the previous legislation respecting the same subject-matter, no part of which does this act profess to alter.

It may be added, that this construction is not only required by the universally-admitted rules of statutory interpretation, but it is in harmony with the personal rights secured by the constitution, and which congress must be presumed to have kept in view. It gives to the accused a trial before sworn judges, a right to challenge, an opportunity of defence, the privilege of hearing the witnesses against him, and of calling witnesses in his behalf;

it preserves to him the common-law presumption of innocence, until he has been adjudged guilty according to the forms of law; it gives finality to a single trial; if tried by a court-martial and acquitted, his innocence can never again be called in question, and he can be made to suffer no part of the penalties prescribed for guilt. On the other hand, if a record of conviction by a lawful court be not a prerequisite to suffering the penalty of the law, the act of congress may work intolerable hardships; the accused will then be obliged to prove his innocence whenever the registry of the provost-marshal is adduced against him; no decision of a board of election officers will protect him against the necessity of renewing his defence at every subsequent election, and each time, with increased difficulty, arising from the possible death or absence of witnesses. In many cases this may prove a gross wrong; it cannot be doubted, that in some instances, there were causes that prevented a return to service, or a report, by persons registered as deserters by provost-marshals, that would have been held justifying reasons by a court-martial, or, at least, would have prevented an approval of the court's sentence. It is well known, also, that some who were registered deserters were, at the time, actually in the military service as volunteers, and honorably discharging their duties to the government; to hold that the act of congress imposes upon such the necessity of proving their innocence, without any conviction of guilt, would be an unreasonable construction of the act, and would be attributing to the national legislature an intention not warranted by the language and connection of the enactment.

It follows, that the judgment of the court below, upon the case stated, was right; the plaintiff, not having been convicted of desertion and failure to return to the service, or to report to a provost-marshal, and not having been sentenced to the penalties and forfeitures of the law, was entitled to vote.

(Disfranchisement.)

WOODWARD, C. J. I concur in the conclusion stated in the above opinion, and in most of the reasonings by which that conclusion is reached. But I do not concur in treating the act of congress as a valid enactment; for I believe it to be an *ex post facto* law, in respect to all soldiers, except such as commit the crime of desertion *after* the date of the law. This is not a case of desertion subsequent to the enactment, but prior to it, and the penalties of the offence are such as were fixed by law when it was committed, and it is not competent for the legislature to increase them, except for future cases.

Judgment affirmed.

READ, J., and AGNEW, J., dissented.

---

The punishment of disfranchisement is not a cruel and unusual one; and it is competent for the legislature, unless restrained by the state constitution, to inflict it as a penalty for crime. But where the constitution provides that laws may be passed, excluding from the right of suffrage, persons who have been or may be convicted of *infamous* crimes; it would seem, that it is not in the power of the legislature to inflict this penalty for any other than *infamous* offences, which are treason, felony and every species of the *crimen falsi*, such as perjury, conspiracy and barratry. This definition does not include the offence of duelling. *Barker v. People*, 20 Johns. 457.

After the decision in *Huber v. Reily*, the legislature of Pennsylvania passed the act of 4th June 1866, disqualifying deserters from the military service of the United States from exercising the right of suffrage; but the supreme court declared this act to be unconstitutional, on the ground that one who was a qualified elector, under the constitution, could not be deprived of the elective franchise, by a legislative enactment. *McCafferty v. Guyer*, 59 Penn. St. R. 109 (ante 44). The point decided in *Huber v. Reily*, has recently been affirmed by the supreme judicial court of Maine, in *State v. Symonds*, 57 Maine 148. In that case, Dickerson, J., said: "If this act of congress undertook to prescribe the qualifications of electors in the states, it would be unconstitutional; since, under the

constitution of the United States, that prerogative is reserved to the states; but it attempts no such thing, the object of the section in question being to prevent the offence of desertion, by depriving the offender of his rights as a citizen of the United States. It is clearly within the constitutional province of the legislative department of the national government, to define and prescribe the rights of citizenship of the United States, and to declare their forfeiture, as a penalty for deserting the army, in a death-struggle of the government for the preservation of its nationality. When a person has forfeited his rights of citizenship under this act, he loses his right of suffrage, only when this right, under the constitution of the state to which he belongs, is restricted to citizens of the United States; thus, while congress cannot directly deprive a citizen of the right of suffrage, it may deprive him of other rights upon which the right of suffrage may depend; it may incapacitate him from exercising the right of suffrage, but it cannot deprive him of the right itself; the act of congress in question goes to this extent, and no further. In this state, none but citizens of the United States can exercise the elective franchise; to deprive citizens of this state, therefore, of their rights as citizens of the United States, is, in effect, to deprive them of the capacity to exercise the right of suffrage." "The crime of deserting the army of the United States is exclusively an offence against the government of the United States, and can only be inquired into and punished through the courts of the United States having jurisdiction thereof; any adjudication upon this offence, by a state tribunal, would be *coram non judice*; its decision would afford the accused no security whatever from another trial before another tribunal. Courts-martial of the United States have exclusive jurisdiction of this offence, and it is only after trial, conviction and sentence by such court, and the approval of the same by the proper authority, that a citizen of this state can be deprived of the right of suffrage, or any right of citizenship, under the act of congress in question. The record of such conviction is the only legal evidence of the fact of desertion, before any tribunal where this is brought in question." And see, to the same point, *Gotcheus v. Matheson*, 58 Barb. 152.

That it is in the power of a state to disfranchise a portion of its citizens, for rebellion or other crime, when not restrained by the state constitution, was decided in *Ridley v. Sherbrook*, 3 Cold. 569; and *Anderson v. Baker*, 23 Md. 531 (ante 27). The elective franchise is not an inalienable right or privilege, but a *political* right, conferred, limited or withheld at the



(Test-oaths.)

pleasure of the people, acting in their sovereign capacity. *Ibid.* And this power of disfranchisement may be exercised by the imposition of a test-oath, to be taken by each voter at the polls. *Blair v. Ridgely*, 41 Mo. 63. If a party be disfranchised under the state law, for rebellion against the United States, a pardon by the president, though it restores him to the rights of citizenship, does not re-confer upon him the elective franchise. *Ridley v. Sherbrook*, 3 Cold. 569.

---

BLAIR v. RIDGELY.

In the Supreme Court of Missouri.

MARCH TERM 1867.

(REPORTED 41 MISSOURI 63.)

[ *Test-oaths.* ]

A state, having the sovereign power to prescribe the qualifications of its electors, may impose a test-oath to be taken by every voter at the poll: this, in no way, violates the constitution of the United States.

Error to St. Louis Circuit Court. The plaintiff brought his action against the defendants in the court below, who were the judges of an election held in the city of St. Louis, on the 7th day of November 1865, for rejecting his vote, and claimed damages in the sum of \$10,000. In his petition he averred his qualifications as a voter, and stated that he offered to take a certain oath, therein set out, but which was not the oath required to be taken by voters by the second article of the amended constitution of Missouri. The defendants demurred to the petition, on the ground that it did not state facts sufficient to constitute a sufficient cause of action, in this, that it did not state that the plaintiff, when he offered to vote, took or offered to take the oath of loyalty required by the constitution to be taken by all voters, as a condition precedent

(Test-oaths.)

to their exercise of the right of suffrage, at any election held in this state. This demurrer was sustained by the court below.

*Glover and Gantt*, for the plaintiff in error.

*Drake*, for defendants in error.

WAGNER, J., delivered the opinion of the court. The question raised for consideration is of the gravest importance, and involves a consideration of the constitutionality of the oath of loyalty, so far as the same is applicable to voters. It is contended, that the third section of the second article of the constitution of this state, which prescribes the oath, is a nullity, because it is a bill of attainder in the meaning of the constitution of the United States, and because it is an *ex post facto* law in the meaning of the constitution of the United States. *Ex post facto* laws and bills of attainder have been so much discussed of late, in connection with acts springing out of the troubles through which the country has just passed, that it is unnecessary to enter upon an argument concerning their nature and character. The real point to be determined is, whether the constitutional oath which is prescribed as a condition precedent to every man's right to vote, falls within the inhibitions of the constitution of the United States forbidding the states to pass such laws.

The tenth section of the first article of the constitution of the United States declares, that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of a contract;" the tenth amendment to the constitution of the United States provides, that "the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The states, when they entered the union, retained all their original power and sovereignty, except such as were expressly

(Test-oaths.)

surrendered to the general government, or they were expressly prohibited from exercising; subject to these exceptions, they are independent commonwealths, and the exclusive judges of what is just and proper for their safety, welfare and happiness. From the foundation of the government, the supreme court of the United States, as well as the courts of the respective states, have abstained from declaring a law unconstitutional, unless it was a case free from all doubt; the co-ordinate departments are all equal, each acts under the same solemn sanctions, and one will not assume the responsibility of annulling the work of the other, except upon the clearest evidence that it has transcended its powers, or violated the organic law of the land. To justify a court in pronouncing a legislative act unconstitutional, or a provision of a state constitution to be in contravention of the constitution of the United States, "the case must be so clear," to use the language of a learned author, "that no reasonable doubt can be said to exist." Sedgwick on Stat. & Const. Law 592.

The judiciary will not be justified, nor, indeed, will it be authorized, to nullify and abrogate a law, merely because it deems the law unwise, unjust or impolitic; these being questions purely within the cognisance of the law-maker, the remedy not being through the agency of the courts, but in the hands of the people by the exercise of their political power. Any other practice would tend to produce continual conflict and dissension between the different branches, where mutual respect and harmony should prevail, and ultimately paralyze the functions of government. But, notwithstanding these considerations, where any law, or any provision or clause of a state constitution, clearly and unquestionably violates the constitution of the United States, the courts can no more shrink from declaring it void and of no effect, than they can refuse to pass upon and determine any ordinary matter which comes within the admitted circle of their jurisdiction.

When the federal constitution was adopted, we derived

(Test-oaths.)

our whole system of common law from the parent country, and the prohibition against *ex post facto* laws and bills of attainder, was levelled against such laws as known and practised in England. In those cases in English history, where bills of attainder have been passed, they have generally referred to the parties by name; for they are in the nature of judicial sentences, and directly affect those against whom they are aimed, without the formality of a trial; we have seen no case (and it would seem to be an impossibility) where such laws have been passed, having universal application, and were laid down as rules comprehending the whole people of a state. In the act for banishing and disennobling the Earl of Clarendon, the law designated him by name, and proceeded to inflict upon him certain penalties, without trial; so, too, in the cases of the Bishop of Rochester and John Plunket, and in the act disfranchising John Burnett and his associates from voting at election of members to serve in parliament, and for the preventing bribery and corruption in the election of members to serve for the borough of New Shoreham. The Earl of Kildare and his adherents were attainted without specifying their names, but sentence was absolutely passed upon them and execution followed, whenever they were identified, without reference to any act on their part.

But the section of the constitution we are now considering has been before the supreme court of the United States, in *Cummings v. Missouri* (4 Wall. 277), and it was there held by a majority of the judges, reversing the decision of this court, that the provision was in the nature of pains and penalties, so far as it related to the oath required to be taken by preachers, and was, as to them, consequently, void; five of the judges concurred in this opinion, and four dissented; and Mr. Justice Miller, on behalf of the minority of the court, delivered an opinion, which, for ability, logic and admirable judicial criticism, has rarely been excelled even in that august tribunal. It is now claimed that that decision is decisive, and also concludes

(Test-oaths.)

this case. Did we think so, we should unhesitatingly follow it, although our opinions and convictions remain unchanged; for it is to the interest of the country, that an end should be put to litigation, and principles of law settled; and whenever the courts of last resort fairly decide a question coming within their jurisdiction, it is the duty of inferior courts to submit, and to obey the paramount authority, although they may not be satisfied with the result. There was but one question presented to the court for adjudication in the Cummings case, and that was, the constitutionality of the oath of loyalty, so far as the same applied to preachers and ministers of the gospel. It is true, Judge Field, who delivered the opinion of the majority of the court, *arguendo*, speaks of other pursuits, professions and trusts, for the following or holding of which the oath is enacted as a condition precedent, and condemns them all as liable to the same objection. Now, in a case where the principle is identical with the decision, we feel bound to follow it;\* but arguments or illustrations on different points, not necessary to the decision of the case, constitute no part of the judgment of the court, and can no more be deemed binding authority than the animadversion which the learned judge sees fit to pass upon the whole constitutional provision.

It is not for us to determine whether the law is just or unjust, politic or impolitic; that is the appropriate function of another body; nor is it within the sphere of our duties to go into an inquiry, or speculate as to the effect it may have on future political parties. Mr. Justice Iredell, who possessed an unclouded intellect and unbiassed judgment, after stating, in *Calder v. Bull* (3 Dall. 399), that a statute in violation of the constitution is void, continues, "if, on the other hand, the legislature of the union, or the legislature of any member of the union, shall pass a law,

\* To the honor of the court, be it said, they *did* follow it, in the case of attorneys at law, in *State v. Glover*, 41 Mo. 339; and of school-teachers, in *State v. Heighland*, *Ibid.* 388.

(Test-oaths.)

within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice; the ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed on the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." There is no fixed and certain standard of reference by which the expediency or justice of a measure can be ascertained, and in order to form a correct judgment, it is necessary to have a knowledge and acquaintance with all the facts and circumstances which originated it or led to its adoption.

The decision of the supreme court of the United States in the *Cummings* case, proceeds on the idea, that the right to pursue a calling or profession, is a natural and inalienable one, and that a law precluding a person from practising his calling or profession, on account of past conduct, is inflicting a penalty, and therefore void. There are certain rights which inhere in and attach to the person, and of which he cannot be deprived, except by forfeiture for crime, whereof he must be first tried and convicted according to due process of law; these are termed natural or absolute rights. Blackstone says, "by the absolute rights of individuals, we mean, those which are so in their primary and strictest sense; which would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society, or in it." These rights may be arranged under the following heads: 1. The right of personal security: 2. The right of personal liberty: and 3. The right to acquire and enjoy property: to these the distinguished commentator on American law has added a fourth head, which found no place under the English system, namely, the free exercise and enjoyment of religious profession and worship.

(Test-oaths.)

When the sturdy barons wrested *magna charta* from a despotic king, they put these words into that great instrument, "no freeman shall be taken (arrested) or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or the law of the land: we will sell to no man, we will deny to no man, we will delay to no man, either justice or right." The words "by the law of the land," as used in the great charter, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and Story remarks that the better and larger definition of "due process" is, that it means law in its regular course of administration, through courts of justice. Lord Coke, in commenting upon the above passage in *magna charta*, says, that it enunciated no new principle, but was declaratory of the common law. The illustrious author of the Declaration of Independence embodies the same inestimable axioms, when he declares, that "all men are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness;" essentially the same principles are inserted in the amendments to the constitution of the United States, and in the bills of rights of the respective states.

The right then, to life, liberty and private property, is natural, absolute and vested, and belongs to the individual, as well in a state unconnected with society, as in the most carefully-guarded and well-arranged system of government; he cannot be deprived of life, but by due process of law; he can be restrained of his liberty only by the same means; and his right to acquire and enjoy property, and reap the fruits and earnings of his own industry, should be guaranteed and protected. A man may be said to have a special property in his profession or calling, by which means he makes his support; and he can be deprived of it only in the usual manner, according to the common forms of

(Test-oaths.)

law. In a state of nature, if he had never entered into society, he would, undoubtedly, have had the right to select his avocation, whereon to depend for maintenance, and he cannot be said to have surrendered it, by entering into the social compact, except so far as may be necessary for the general good, in manner to be regulated by law.

But is the right to vote, or to exercise the privilege of the elective franchise, a right either natural, absolute or vested? It is certain, that in a state of nature, disconnected with government, no person has or can enjoy it; whilst his rights of breathing, free locomotion, and the acquisition and enjoyment of property, are perfect and complete: and here it is worthy of observation, that Judge Field, in the Cummings case, while enumerating several of the classes to which the oath extends, all of which, he considers, render it obnoxious to the constitutional inhibition, carefully and guardedly refrains from including the right to vote in the category. That the privilege of participating in the elective franchise, in this free and enlightened country, is an important and interesting one, is most true; but we are not aware that it has ever been held or adjudged to be a vested interest in any individual. Judge Washington, in *Corfield v. Coryell*, 4 Wash. C. C. 371, speaks of it as one of the fundamental franchises, under our form of government, to be regulated and established by the laws or constitution of the state in which it is to be exercised.

The leading case on the subject is *Ashby v. White*, 2 Ld. Raym. 938, where the plaintiff averred that he was a "burgess" and an inhabitant of the borough of Aylesbury, where the election was held; that being such burgess and inhabitant, he had the right to vote; and that the defendants, who were constables of said borough, and officiating as judges of the election, were then and there requested to receive and allow his vote; but that they absolutely refused to receive and allow the same; whereupon he brought his suit, and claimed damages in the sum



(Test-oaths.)

of £200. Upon a plea of not guilty, there was a verdict for the plaintiff; and judgment was afterwards arrested, in the king's bench; Powell, Powis and Gould, JJ., held, that the action could not be maintained; but Holt, C. J., dissented, and gave an opinion for the plaintiff; a writ of error was prosecuted in the House of Lords, where the judgment of the king's bench was reversed, and the views of Holt adopted and sustained. But the chief justice did not proceed upon the idea of a natural and inherent right in the citizen to vote; for he expressly says, that before the statute of 8 Hen. VI., ch. 7, any man that had a freehold, though never so small, had a right of voting; but by that statute the right of election was confined to such persons as had lands or tenements to the yearly value of 40s., because, as the statute said, of the tumults and disorders which happened at elections, by the excessive and outrageous number of electors. But he states that the right of election, in that case, was a direct grant, incident to and inseparable from the freehold. It was the case of a burgess, and the plaintiff claimed the right to vote by reason of his burgessship; and Littleton, in his chapter of tenure in burgage (lib. 2, ch. 10, sect. 162, 108 b), was quoted, where he says, "tenure in burgage is, where an ancient borough is, of which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage;" and also sect. 164, where he says, "and it is to wit, that the ancient towns called boroughs be the most ancient towns that be in England, and are called boroughs, because of them come the burgesses to parliament." So that the tenure of burgage was from the antiquity, and their tenure in socage was the reason of their estate, and the right of election was annexed to their estate. There is no such annexation or grant of franchise as to elections in this country.

It will not now be necessary to inquire by what charter or authority, and upon what terms, the citizen is invested with the ballot in this state. As before remarked, outside

(Test-oaths.)

of society, and disconnected with government, no person either has or can exercise the elective franchise, as a natural right, and he only receives it, upon entering the social compact, subject to such qualifications as may be prescribed. Prior to the adoption of the federal constitution, the respective states possessed unlimited and unrestricted sovereignty, and retained the same ever afterwards, except so far as they granted certain powers to the general government, or prohibited themselves from doing certain acts; every state reserved to itself the exclusive right of regulating its own internal government and police.

Prior to the year 1820, Missouri was a mere territory, not a state clothed with the power of self-government; but, in pursuance of the authority of the act of congress of 6th March, passed in that year, the inhabitants of the territory of Missouri elected delegates to a convention to form a constitution for the state. The only limitation imposed by congress was, that the constitution, when formed, should "be republican, and not inconsistent with the constitution of the United States;" subject to these conditions, there was no limitation or restraint upon their action as to the organism and principles of the state they were about to form. The people, through their representatives assembled in convention, proceeded to form the constitution, which was to organize them into a state; and in the declaration of rights, embodied in that constitution, as general, great and essential principles of liberty and free government, we find the following: 1. "That all political power is vested in and derived from the people:" 2. "That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government, whenever it may be necessary to their safety and happiness." With these provisions in her constitution, Missouri was admitted into the union, and recognised as one of the sisters in the republic, on the same terms, and with the same powers, as the original states; her admission was a

(Test-oaths.)

direct and positive declaration, that her constitution was republican in form, and not inconsistent with the constitution of the United States.

There was, then, a complete reservation by the people of the power to exclusively regulate and control the internal government and police of the state; and to alter, amend or abolish their constitution, whenever they might deem it necessary for their safety and happiness. Now, what is meant by the "people," as used in this connection? Ordinarily, it may be true, that when we speak of the people, the entire body of the inhabitants of the state is comprehended; but this cannot be so in a political sense; it can only mean that portion of the inhabitants who are entrusted with political power. Neither in this, nor in any of the American states, did the inhabitants, other than qualified voters, ever exercise political power; and it is only through the instrumentality of ballots that such power is or can be exercised. This truth is exhibited by the fact that, whilst the constitution declared that all power resided in the people, less than one-fourth of all the inhabitants exclusively exercised the political power, and more than three-fourths were always disfranchised. The people, for political purposes, must be considered synonymous with qualified voters; and their very first act, in the formation of a state government, was to exclude from the right of suffrage more than three-fourths of the whole inhabitants; the exclusion of women, children and negroes is purely arbitrary, and fixed and regulated by law. If the power to regulate the internal government and police of the state resided in the people, and was their "inherent, sole and exclusive right," the conclusion is inevitable, that it was their peculiar and exclusive province to say and determine what should constitute any inhabitant of the state a qualified voter. The power must reside somewhere, and it can only be with the people; and they have always exercised it, both negatively and affirmatively.

(Test-oaths.)

It is not perceived that there is any restraint over the power on this subject; certainly not in the constitution of the United States, for there is not to be found in that instrument a single sentence, paragraph or word which gives the *national* government\* power over the qualifications of voters in any of the states. But the directly opposite is affirmed in that clause cited in the former part of this opinion, which declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." When the people, in 1865, formed and adopted a new constitution as their organic law, they exercised an unquestioned power, an undisputed right. They altered and abolished their constitution, and formed a new one, in which, in pursuance of their exclusive right of regulating their internal government, they prescribed certain qualifications and conditions for the exercise of the elective franchise. Of their perfect and exclusive right to do this, we do not entertain the slightest doubt. The right to vote is not vested; it is purely conventional, and may be enlarged or restricted, granted or withheld, at pleasure, and with or without fault. If a person loan another certain property gratuitously, and the possession be resumed, on account of abuse or ill-treatment, is the taking it from the borrower a penalty or punishment, within the meaning of the constitution of the United States?

But it is said, that the oath of loyalty cannot be regarded as a qualification, because it is not attainable by all. Judge Field expresses this idea in the Cummings case, but it is a sufficient answer to say, that the remark was not made on a question like the one now under considera-

\* The learned judge seems to have forgotten that in the draft of the federal constitution reported by the committee to the convention of 1787, which was presided over by GEORGE WASHINGTON, the word "national" was used, but the convention finally struck it out, and inserted, wherever it occurred, the word "general," as more appropriately designating the character and powers of the government they were creating.

(Test-oaths.)

tion. The illustrations put by Judge Miller, in the same case, are exceedingly apposite, and seem to be incontrovertible: he says, "The constitution of the United States provides, as a qualification for the office of president and vice-president, that the person elected must be a native-born citizen; is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the states require, as a qualification for voting, that the voter shall be a white male citizen; is this a punishment for all the blacks who can never become white? It was a qualification required by some of the state constitutions, for the office of judge, that the person should not be over sixty years of age; to a very large number of the ablest lawyers in any state this is a qualification they can never attain, for every year removes them further away from the designated age; is this a punishment? The distinguished commentator on American law, and chancellor of the state of New York, was deprived of that office by this provision of the constitution of that state; he was, just in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again by a law passed after he had accepted the office."

It is well known, that in the early history of this government, several of the states admitted free negroes to vote on an equality with whites, and subsequently they divested them of that right, denied them that privilege, and confined the elective franchise only to whites; they were disfranchised because they were black, and a white qualification was imposed, which it was physically impossible for them to attain; the privilege was withdrawn from them; they were disfranchised because they were black. We apprehend it will not be contended, that depriving them of the right of suffrage was a punishment, or in the nature of pains and penalties. The law-makers, we presume, owing to peculiar circumstances, thought they were not discreet persons to be entrusted with the

(Test-oaths.)

ballot, just as the framers of our constitution, we suppose, considered that those who had betrayed our flag, and exhibited their hostility to the government, were, for the time being, unsafe and unfit repositories of political power.

The principle of the provision in the constitution is involved in the power, and flows from the duty, of the state to protect itself, that is, the welfare of the people; it proceeds upon the distinction between laws passed to punish offences, in order to prevent their repetition, and laws passed to protect the public franchises and privileges from abuse, by falling into unworthy and improper hands. The state may not pass laws in the form, or with the effect, of bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts; it may, and has full power to pass laws, restrictive and exclusive, for the preservation or promotion of the common interests, as political and social emergencies may, from time to time, require, though, in certain cases, disabilities may directly flow as a consequence. It should never be forgotten, that the state is organized for the public weal, as well as individual purposes; and while it may not disregard and violate the safeguards that are thrown around the citizen for his protection, by the constitution, it cannot neglect to perform and do what is demanded for the public good.

It has grown into an axiom of the law, that public grants are to be construed strictly; and in the absence of any power expressly conceded to the United States, or where its exercise is not directly denied by the federal constitution, the state is not to be presumed, in any grant, to part with any of the power inherent in it for the protection and promotion of the common welfare.\* The power of the state to preserve the general good, and promote the public welfare, is inherent and supreme; deny and destroy this cardinal maxim, and the very foundation of our

\* This has ever been one of the cardinal principles of the democratic party; but it looks strangely to find it in this opinion.

(Test-oaths.)

system is sapped, and the state is shorn of all power for self-protection.

Believing that the provision in the state constitution prescribing an oath for voters, is not in opposition to the constitution of the United States, we affirm the judgment.

Judgment affirmed.

---

The supreme court of Missouri, in *State v. Woodson*, 41 Mo. 227, decided in favor of the constitutionality of the test-oath, as a qualification for office, holding that the power of the state, to declare in its constitution, or, when that is silent, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as the power to fix the qualifications of voters. But, following the decisions of the supreme court of the United States, in *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, *Ibid.* 333, they held it to be unconstitutional, so far as it was required as a prerequisite for carrying on or exercising any ordinary calling, trade or profession, as that of attorney at law, *State v. Glover*, 41 Mo. 339, or school-teacher, *State v. Heighland*, *Ibid.* 388. And see *Ingersoll v. Howard*, 19 Am. L. R. 193.

Where the constitution prescribes the qualifications of voters, and declares that persons possessing them shall enjoy the right of suffrage, it is not in the power of the legislature to impose a restriction on the right in the shape of a test-oath. On the 1st of April 1778, the legislature of Pennsylvania passed an act requiring electors to take an oath of allegiance (P. L. 127) ; but the history of the times shows that this was strenuously resisted as unwarranted by the constitution, and within a very brief period it was swept from the statute book. *McCafferty v. Guyer*, 59 Penn. St. R. 112 (ante 44). And see *Respublica v. Gibbs*, 3 Yeates 429. But whilst this act was in force, the general assembly of Pennsylvania, on the 13th November 1778, determined that citizens who had taken the oath of allegiance, after the 1st day of June then last preceding, the time limited for taking the oath by that statute and its supplement of 10th September 1778 (P. L. 159), were not legal voters ; and that persons claiming their seats as members from Chester county, by virtue of such votes, were not duly elected. *Journals of Assembly* 241. And see *Report of the committee on the York county election*. *Ibid.* 310-315.

In Missouri, the test-oath has been sustained, because it is imposed by

(Naturalization.)

the amended state constitution, and because the constitution of the United States grants no power to the general government in any way to regulate the right of suffrage. And the same doctrine was held in Maryland, in *Anderson v. Baker*, 21 Md. 531 (ante 27).

---

## COMMONWEALTH v. LEE.

In the Quarter Sessions of Chester County, Pennsylvania.

JANUARY SESSIONS 1869.

(REPORTED 1 BREWSTER 273.)

[*Naturalization.*]

A certificate of naturalization establishes a *primâ facie* right to vote; the election officers cannot go behind it.

The court of *nisi prius*, in Philadelphia, being a court of record of common law jurisdiction, and having a seal and a prothonotary, has power, under the acts of congress, to naturalize aliens.

An election officer is not criminally liable for a mere mistake of judgment, but only for a wilful disregard of duty; when indicted for rejecting a vote, the presumptions are in his favor.

Indictment for knowingly rejecting the vote of a qualified elector, as judge of the election. The facts are fully stated in the charge of the court.

*Hemphill* and *Monaghan*, for the prosecution.

*Mc Veagh* and *Smith*, for the defendant.

BUTLER, P. J., delivered the following charge to the jury. By the 103d section of the act of 2d July 1839, it is provided, that "if any inspector or judge of an election shall knowingly reject the vote of any qualified citizen, or knowingly receive the vote of any person not qualified, or conceal from his fellow-officers any fact in the knowledge . . .



(Naturalization.)

of which such vote should by law be received or rejected, each of the persons so offending shall, on conviction, be punished in the manner prescribed in the 107th section of this act." At the election in October last, Edwin Pavitt presented himself at the polls, in Tredyffrin township in this county, and offered to vote; the inspectors disagreeing in regard to his right, the subject was referred to the defendant, as judge of the election, and on his decision, the vote was rejected; for so deciding, and rejecting the vote, the defendant is indicted.

The case presents two questions: 1. Was Edwin Pavitt a "qualified citizen?" and if he was, then—2. Did the defendant "*knowingly* reject" his vote, that is to say, *knowingly* reject the vote of a "qualified citizen."

1. As evidence of his qualification, Mr. Pavitt presented a certificate of naturalization, issued out of the court of nisi prius, in Philadelphia; this certificate is before us, accompanied by the record of the court. On behalf of the defendant, it is urged, that the court of nisi prius is without authority to naturalize aliens, and that its judgments, in this respect, are void. The act of congress of 14th April 1802, § 3, provides that "every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered a district court within the meaning of this act; and any alien who may have been naturalized in any such court, shall enjoy, from and after the passage of this act, the same rights and privileges as if he had been naturalized in a district or circuit court of the United States." The nisi prius is a "court of record," has "common law jurisdiction," and in our judgment, a "seal and clerk or prothonotary." It is true, that the seal and prothonotary are the same as those of the supreme court; but inasmuch as the court may adopt any device it sees fit for its seal, and may select its own prothonotary, we do not regard this as important. Almost from time immemorial, the court of nisi prius has exercised "common law jurisdiction," and

(Naturalization.)

its "records," attested and authenticated by a seal and prothonotary, precisely as the certificate before us, have everywhere been respected and received as of binding force; and at all times has this court exercised jurisdiction in cases of naturalization; every one of the long list of eminent judges who have occupied seats in the supreme court of the state, has, in his turn, when sitting in the *nisi prius*, exercised such jurisdiction, and without question from any quarter of their authority to do so, until just prior to the recent election. We must, therefore, with our present impressions, charge that the certificate and record before us show Mr. Pavitt to have been a "qualified citizen," at the time he offered to vote. The question, as presented here, is entirely for the court; and inasmuch as the opportunity for its examination has necessarily been very slight, we will give to the defendant the benefit of a more deliberate and thorough consideration of it hereafter, if it shall become important to do so.

2. Having disposed of the first question, we now pass to the second: did the defendant "knowingly reject the vote" of this "qualified citizen?" What is meant by the language "knowingly reject the vote of any qualified citizen?" Not, of course, that he knowingly reject the vote, but that he do so, *knowing* it to be the vote of a "qualified citizen;" in other words, rejecting a vote that he *knows to be qualified*. The officer is not made responsible for a mistake of judgment; if he reject the vote of one whom he believes not qualified, he is not liable to the penalties of the statute, although the individual may have been qualified and entitled to vote. It is for a wilful disregard of his duty, that he is made liable to punishment, and not for error of judgment; the statute did not, in this respect, create a new offence; the rule of the common law was the same; a public officer, required to exercise judgment, must do so conscientiously; nothing more is required; to punish for an honest mistake, would be

(Naturalization.)

cruel. If the law were otherwise, no sensible man would be found willing to occupy such an office.

Then, did the defendant, when he rejected Pavitt's vote, know him to be a qualified citizen? If he did, he is guilty of the offence with which he is charged; if he did not, he is not guilty; and this inquiry, whether the defendant knew Pavitt to be a qualified citizen, when he rejected his vote, is entirely for the jury. In starting out upon it, you must bear in mind, however, that the presumptions are in the defendant's favor; in the first instance, the law presumes a public officer to have honestly performed his duty; when called upon to exercise discretion, judgment, he is regarded as having exercised it honestly; and those who allege the contrary (that he disregarded his duty, did not judge honestly, but acted corruptly), must show it. You thus perceive that, in the case before us, the burden is upon the commonwealth to show that the defendant, in rejecting the vote, was *not* governed by an honest judgment, did not act conscientiously, but wilfully, intentionally disregarded his duty. It is not necessary, however, that this shall be shown by direct or positive proof; it may be inferred from circumstances, if there be any out of which such an inference naturally arises.

Then, starting with the presumption in the defendant's favor, does the evidence show, that he knew, when he rejected Pavitt's vote, that he was a qualified citizen; in other words, that he decided corruptly and not conscientiously? In passing upon this, it is necessary to look at the character of the question the defendant was called upon to decide, and the manner in which he conducted himself in hearing and disposing of it. It was not, whether a native of the district, accustomed to vote therein, should be permitted to vote on this occasion, about which men of ordinary intelligence would be likely to agree; but whether a foreigner, presenting a certificate from the court of *nisi prius*, and especially, a certificate

(Naturalization.)

of the date which Pavitt's bore, was a qualified citizen within the meaning of the act of assembly. Had this been a plain question, about which there was no diversity of opinion in the public mind, and about which a man of ordinary intelligence could not well get astray, the mere circumstance that the defendant's decision was wrong, might give rise to an inference against the honesty of his act. The question, however, was not a plain one; there was a difference of opinion among intelligent men, in regard to it, and the evidence shows that judges of the supreme court expressed conflicting judgments about it; such was the question to be decided. Now, how did the defendant act or conduct himself in relation to it? like one who desired to discharge his duty, or one who had made up his mind to disregard it? When the vote was challenged and referred to him, the evidence shows, that he listened to argument on both sides; heard the opinion of counsel, that had been obtained by one of the inspectors; examined the paper promulgated as the "Opinion of Judge Read;" postponed the decision until a later hour in the day, with a view, as he expressed it, to obtaining further advice of counsel; and subsequently decided, after a rehearing, and upon a demand of Mr. Pavitt or his friends, that the question should then be determined without further delay.

It is shown, however, that at an earlier hour in the day, a vote was offered under somewhat similar circumstances, and upon objection being made, and the question referred to the defendant, it was decided differently, and the vote received; in this instance, it appears, that Mr. Evans, a well-known citizen in the neighborhood, assured the defendant, that he had been present in the court-house, and had seen the individual naturalized. This should have made no difference; the certificate, until its genuineness was disproved, was sufficient evidence that Pavitt was in court, and his case duly passed upon; the officers could not go behind it, and demand additional proof. Still it is for

(Naturalization.)

you to judge whether the defendant mistakenly supposed they could, and thus distinguished this case from Pavitt's; and in this connection, you will remember the statement of Pavitt, made here, that he also produced to the defendant, an individual (not known to the defendant, however) who offered to be qualified that he was present in court and saw Pavitt naturalized; and you will then judge whether there was any distinction between Pavitt's case and the others; and what weight the circumstance here referred to, should have, if there was not. It does not appear how the individual referred to, voted, nor how Mr. Pavitt designed to vote; but there is some evidence that those who took an interest in having Pavitt vote, had aided the other also; you will judge whether the decision in the one case, was in favor of the political party with which the defendant is identified, and the other against it; if it was, the fact referred to is important; otherwise, it may not be.

We have now called your attention to the principles of law, and the substance of the evidence, upon which this case should be decided; you will take it, consider it impartially, and seek to do justice between the commonwealth and the defendant; remembering that if the defendant is guilty, has prostituted the public trust reposed in him to partisan or other corrupt purposes, the public is deeply interested in his conviction; while, if he is innocent, or the evidence fails to show his guilt, the public is equally interested in his acquittal.

Verdict for defendant.

---

The facts which led to Lee's prosecution for knowingly rejecting the vote of a qualified citizen, at the general election of 1868, present a curious episode in the political history of Pennsylvania. In that year, Mr. Justice Sharswood, one of the ablest jurists and purest men that ever adorned the bench of the supreme court, was assigned to hold the court of nisi prius, during the months of September and October; it was the year of the presidential election, when the number of applications for

(Naturalization.)

naturalization is always much greater than at other periods; during the civil war, naturalization had almost ceased, in consequence of the liability to military conscription thereby incurred; and as might have been expected, under all the circumstances, the number of naturalizations was unusually large. As Col. James Ross Snowden, the prothonotary of the supreme court, was the only officer of a similar grade in Philadelphia who was attached to the democratic party, it was to be expected that a majority of these applications would be made to the court of which he was the officer; and such was the fact. The petitions were acted upon by Judge Sharswood, in the manner that had prevailed in all the courts of Philadelphia for a period of upwards of thirty years, with a modification that had been introduced into the court of *nisi prius*, and had received the sanction of all the judges of the supreme court, which was, to refer the examination of the regularity of the papers to the prothonotary, who was a lawyer of mature age and experience, appointed by the court itself, and possessing its entire confidence, with directions, however, that if any doubt or question arose in his mind, in any case, to report it for the opinion of the judge.

There was no evidence of any fraud having been practised in the issuing of certificates of naturalization, though a most searching investigation was made before Mr. Justice Sharswood, in the case of *Commonwealth v. Snowden*, 1 Brewst. 218. But it was shown that twelve forged certificates, purporting to have issued from the court of *nisi prius*, were found, as was alleged, upon the person of one John Devine, a prisoner in one of the police stations, who had been arrested for drunkenness and disorderly behavior, and whilst at the door of the station-house had been struck on the head with some blunt instrument and stunned, and who remained in an insensible condition until the following morning, when the forged certificates were said to have been found upon his person. The learned judge, after a full and searching examination, Devine himself being examined as a witness, and no person having been called or produced to contradict or explain his statements, came to the conclusion, that Devine neither stole the blanks nor forged the names, and that they were not given to him for election purposes. No man, said the learned judge, who would commit the crime of purloining or forging them, would select such an agent to consummate it. I have come to the conclusion, added he, after full consideration and weighing all the circumstances, that John Devine, on the night or early

## (Naturalization.)

morning of his arrest, fell among his enemies, personal or political, and that he had not possession of these papers knowingly, and for a fraudulent purpose.

Under these circumstances, Mr. Justice Read, on the eve of the election, issued a *pronunciamento*, in the shape of an extra-judicial opinion, which he said was concurred in by Mr. Justice Agnew, and by Judge Williams (who had been appointed by the governor to fill a vacancy on the bench, but had not at that time signified his acceptance of the appointment), in which he declared, that the practice of naturalization pursued in the *nisi prius*, however old, or by whatever judges sanctioned, was contrary to the plain words of the acts of congress, and was therefore illegal. The consequence of this extraordinary proceeding on the part of a high judicial functionary, was, that the republican election officers were furnished with a convenient pretext for rejecting all certificates of naturalization issued from the court of *nisi prius*, some thousands of qualified electors were disfranchised, and the election was carried by the republican party.

Mr. Justice Read took his seat in the court of *nisi prius* on the 2d November 1868, and immediately made an order that no more aliens should be naturalized in that court; and that no indorsement of any kind, nor any certificate whatever, should be made by the prothonotary, or any person in his office, upon or in relation to any certificates of naturalization issued between the 13th of September and the 13th of October 1868. The validity of these orders came up before the Chief Justice, in April 1869, when it was decided, that they were extra-judicial in their character, neither resting on proceedings by parties, nor sustained by process or pleadings; that they stood as obstructions in the way of the exercise of a settled jurisdiction, and must be set aside and annulled. *Ex parte Barron*, 1 Brewst. 383.

That it is not in the power of the election officers to go behind a regular certificate of naturalization, was also decided by the court of quarter sessions of Philadelphia, in *Commonwealth v. Sheriff*, 1 Brewst. 183. And in *Commonwealth v. Leary*, *Ibid.* 270, it was held, in the court of quarter sessions of Delaware county, that a certificate of naturalization, in due form and properly attested, is sufficient evidence, in the first place, that the individual named in it was duly examined and sworn in open court, in the presence of some of the judges, and that the certificate was regularly and lawfully issued; that it could not be collaterally attacked, and that those who asserted that it was not issued

(Naturalization.)

according to law, must prove their allegation. The seal of the court is conclusive, unless the certificate has been obtained by fraud. *Commonwealth v. Paper*, 1 Brewst. 263. And see *Gibbons v. Sheppard*, 2 Ibid. 130; and *The Acorn*, 2 Abbott U. S. Rep. 434; in the latter case, Longyear, J., said, "If every naturalized citizen must always be prepared with his proofs to maintain the grounds upon which he obtained his papers, in all courts and places in which they may be brought in question, the boon of citizenship, which is so liberally bestowed, would be barely worth possessing." And see the authorities cited by the learned judge in that case.

If a party claim to be a qualified elector by reason of his parent's naturalization, he must produce to the election officers his father's certificate of naturalization; he is incompetent to prove it by his own oath. *Price v. Barber*, 13 Leg. Int. 140. That when a person who is alien born has voted at an election, his vote is presumed to be a legal one, until at least *prima facie* evidence be given of the want of naturalization, was decided in *People v. Pease*, 30 Barb. 588; s. c. 27 N. Y. 45. And this, on the principle that no man is presumed to have committed a crime, until some affirmative evidence be given to raise the presumption.

The jurisdiction of the court of nisi prius to naturalize aliens was sustained by Chief Justice Thompson in a learned argument, citing numerous precedents from the 17th June 1799, when Henry Leiper was naturalized before Chief Justice McKean, until the present day; during a period of upwards of seventy years, he shows that at least 24,000 persons had been naturalized in that court, without a question of the right, even in the most exciting periods; and he adds, "if these thousands of precedents, running through a period of seventy years, do not sufficiently test and prove the accuracy of the exercise of the jurisdiction in this court, under the acts of congress, seventy times seventy years of equally uniform practice would have no more conclusive effect on those, whose wishes, not judgment, may seek to arrive at a different conclusion." *Ex parte Barron*, 1 Brewst. 383.

A naturalized citizen, lawfully assessed, paying the tax, and in other respects qualified, is entitled to vote, though naturalized within ten days of the election; aliens are taxable, and obliged to contribute to the support of the government that protects them; it is lawful, therefore, to receive the tax so assessed upon them, as soon as it is lawfully assessed; and as soon as they are naturalized they are entitled to all the rights of citizenship, including that of suffrage. *Anon.*, 1 Brewst. 158.



WILLIAMS v. WHITING.

In the Supreme Judicial Court of Massachusetts.

OCTOBER TERM 1814.

(REPORTED 11 MASSACHUSETTS 424.)

[*Residence.*]

To entitle an elector to vote for a representative in congress, he must have resided, for one whole year previous to the election, in the town where he offers to vote.

This was an action on the case against the selectmen of the town of Dedham, for refusing to receive the plaintiff's vote for a representative in congress, at an election held for that purpose, on the 2d of November 1812. The declaration contained two counts; in the first, the plaintiff alleged his residence in Dedham for one year preceding the election, an undue rejection of his vote by the defendants, and their refusal to put his name on the list of qualified voters; the second contained the same gravamen, with an averment that the plaintiff was a qualified voter within the said district.

The case was submitted upon an agreed statement of facts, from which it appeared that the defendants, at an election for a representative in congress for the district of Norfolk, held on the 2d November 1812, at which they presided, were requested by the plaintiff to place his name on the list of qualified voters of the said town of Dedham, and also to receive his vote for such representative, and that he offered the defendants his vote at said election; but the defendants refused to place his name on the list, or to receive his vote, or to permit him to vote thereat. That the plaintiff was a native-born citizen, of the age of twenty-one years and upwards, and possessed of property of greater value than \$200. That on the 28th October

(Residence.)

1811, the plaintiff was a resident in Roxbury, being a householder and having a family there; previously to that day, he had been appointed, commissioned and qualified as clerk of the judicial courts in the county of Norfolk; and on that day, he came to Dedham, for the purpose of performing the duties of his office, and took possession of the apartments of the court-house assigned for the use of the clerk. That his family and household establishment remained in Roxbury until the 12th November, when he removed them to Dedham; from the 28th October to the 12th November, he boarded at a public-house, at Dedham, and during the first week lodged there three nights; that on the 29th October, he contracted for a house in Dedham, which he was to rent and occupy from the 12th November; that on the 1st November, he returned to his family in Roxbury, where he continued until the 4th; that on the last-mentioned day, he contracted, at Roxbury, for a horse and chaise to go to Dedham daily, and return to Roxbury at night, which he used accordingly on the 4th, 5th, 6th and 8th of November, having been detained at Dedham on the night of the 6th; that from the evening of the 8th to the 12th November, he did not return to Dedham; from the 28th October to the 12th November, he had his washing, &c., done in his family at Roxbury. That on the 24th June 1812, the plaintiff was superseded in his office of clerk, and immediately after opened an office in Roxbury, as an attorney, advertising that he had resumed his professional business. That from the 24th June to the 12th November following, his family remained in Dedham, he frequently going to Roxbury and returning to Dedham at night; and that during this term, being a justice of the peace for the county of Norfolk, he had writs made returnable before him, at his office in Roxbury, where he officiated as a justice, entering up judgments and issuing executions.

*Metcalf*, for the plaintiff.

*Bigelow* and *Chickering*, for the defendants.

(Residence.)

PARKER, C. J., delivered the opinion of the court. The only qualification, to entitle the plaintiff to vote in Dedham, when his vote was rejected by the defendants, which is disputed, is his residence in that town for one year next preceding the election; he had before resided in Roxbury, within the same congressional district, and the question is, whether he had been domiciled in Dedham one year immediately preceding the election. He had unquestionably a right to vote, provided he had been so domiciled. On the 28th of October in the preceding year, he received an appointment, which rendered it convenient, if not necessary, for him to dwell in Dedham; and he then began to prepare for his removal; from that time until the 12th of November, he passed almost every day to Dedham, where he transacted his business, and returned to his family each night, except three, on which he slept at Dedham rather by accident than design; he had also, on the 29th of October, engaged a house in Dedham, but he did not occupy it until the 12th of November, on which day he removed his family, and became domiciled in Dedham.

We are of opinion that, under these circumstances, he remained an inhabitant of Roxbury, until the day of his removal with his family; and there can be no doubt, that he might legally have exercised any of his municipal privileges there, up to that time. It follows, that he did not begin to be an inhabitant of Dedham, until after the 2d day of November 1811; and as the election at which he tendered his vote, was on the 2d day of November 1812, he was not then entitled to vote, in consequence of having been an inhabitant of that town for one year next preceding the election.

But another ground was assumed by his counsel, and very ingeniously maintained in argument, namely, that being a resident within the congressional district, for which the election was holden, and being otherwise duly qualified, he had a right to vote in any town within that district;

(Residence.)

and the court were, for some time, strongly inclined to this opinion. But a due consideration of the constitution, and the laws relative to this subject, and the consequences of establishing a right to vote in any other town than that of which the voter is an inhabitant, has induced us to change our opinion. It is true, as suggested by the counsel, that some of the reasons for confining the electors of representatives in our general court, to towns, do not exist in the case of electors of a member of congress. But the qualifications of electors are settled by the constitutions of the United States and of this commonwealth; and there is no power, while those constitutions remain, to add to or diminish from those qualifications.

By the constitution of the United States, the electors of a representative in congress are to have the qualifications requisite for electors of the most numerous branch of the state legislature; and by the constitution of this state, one of the qualifications for an elector of a representative is, a residence in the town where he offers his vote, for the space of one year next preceding any election. We do not suppose that an uninterrupted residence is required of a person who has his home in any particular town; for, occasional absences for pleasure, health or business, may happen to many inhabitants of a town, in the course of a year; and it was not intended, that such absences should deprive them of their right to vote. But it is necessary that, for the space of a year, the voter should have had his home in the town where he claims to exercise this privilege; and a person removing from one town to another, does not acquire a right to participate in the choice of a representative of his adopted town, until he has made it his home for the space of a year before the election. Whether a citizen, removing into a neighboring town with his family, with an evident intention to change his residence, retains the right of voting in the town he has left, until he has acquired it in the town to

(Residence.)

which he has removed, is a question not now before us.\* If he does not, *volenti non fit injuria*; and if the election is deemed by him of sufficient importance, he can always choose his time for removal, so as not to lose his right.

It has been argued, that our legislature have given a different construction to this constitutional provision, by extending the powers and duties of selectmen of towns, with respect to these elections, to the assessors of incorporated plantations, which have not a right, by the constitution of the state, to elect representatives to the state legislature; and this, it is said, is practically admitting that every qualification to vote for a state representative, is not necessary to entitle one to vote for a member of congress. It is true, that in this respect, persons may be considered as allowed by the legislature to vote for members of congress, who are not permitted to vote for state representatives. We apprehend, however, that there is no provision in any statute, authorizing persons to vote in any other than their own town or plantation; the inhabitants of plantations too may be considered as qualified to choose representatives, if they, together with the other qualifications, have that of residence. It is because the community to which they belong, has not arrived at the enjoyment of corporate powers in this particular, that a representative cannot be sent; not because the inhabitants are not personally qualified.

But supposing that the legislature has the right to make a distinction between the personal and local qualifications of an elector, and to determine that the constitution of the United States requires only that the personal qualifications of the electors shall be the same with those of the electors of the popular branch of the state government; still, some act of the legislature is requisite, to authorize the selectmen of any town to receive the vote

\* That he does not, was decided in *McDaniel's Case*, 3 Penn. L. J. 310; and in *Thompson v. Ewing*, 1 Brewst. 103.

(Residence.)

of any person, not an inhabitant. By standing laws, towns are required to have correct lists of the qualified voters belonging to the town, and the selectmen are bound to govern themselves by those lists. How could they proceed at an election, if they were bound to examine the qualifications, and receive the votes, of multitudes who might present themselves at the polls from distant towns in the same district? Perhaps the legislature might provide by law, that all the votes for the district of Norfolk should be given in to the selectmen of Dedham, or of any other town in the district; but this would be so manifestly inconvenient, both to the selectmen and the electors, that we cannot suppose the provision existing, unless we find a clear and positive statute to that effect.

Upon full consideration of this subject, we do not think, if we had the power of changing the constitution, we should attempt it in this instance. If electors were not limited, in the exercise of their privilege, to some particular space, great abuses might be practised, by going from town to town, and multiplying the vote of an individual, in districts where the towns are contiguous, and where they hold their meetings at different hours of the day. Besides, as there are qualifications of property, which are with difficulty ascertained, we believe that the residence of a voter within the corporation for a year, will enable the officers who regulate the elections, to judge more correctly, than if they were obliged to receive the votes of strangers, who may have lived but a few days within their observation. Upon the whole, we are satisfied that the defendants have done no wrong to the plaintiff, in the instance complained of; and according to the agreement of the parties, the plaintiff must be called.

Judgment of nonsuit.

---

Residence, within the meaning of the constitution, as applied to the qualification of an elector, is the same as domicil, the place where a man establishes his abode, makes the seat of his property, and exercises

## (Residence.)

his civil and political rights. *Chase v. Miller*, 41 Penn. St. R. 404. To constitute residence within the state for the purpose of exercising the rights of an elector, two things must concur ; first, the party must have actually resided in the state one year before tendering his vote; secondly, such residence must have been with the intent to become a citizen of the state, and to abandon the citizenship he may have previously had in another state ; mere residence for the purposes of business or pleasure, unaccompanied with an intention to abandon the former citizenship, is not sufficient ; such temporary residents are not citizens of the state, within the meaning of the constitution. *Anon.*, Common Pleas, Philadelphia, October 1848. To constitute residence there must be an intention to remain ; but this intention is entirely consistent with a purpose to remove at some future indefinite time. *Miller v. Thompson*, 2 Cong. Elect. Cas. 118 ; *Pigott's Case*, *Ibid.* 463.

Domicil or residence, in a legal sense, is determined by the intention of the party ; he cannot have two homes at the same time ; when he acquires another, he loses that home which he has exchanged for the new one ; but to effect this change, there must be both act and intention. *State v. Frest*, 4 Harrington 558 ; *McDaniels' Case*, 3 Penn. L. J. 310. When an elector removes his family to a county, with the intention of residing there, that is the county where he should vote, while his family remains there, though he passes his time and works in an adjoining county. *People v. Holden*, 28 Cal. 124. When by birth or residence one has acquired a fixed domicil, a temporary absence, on business or pleasure, with an intention of returning, will not work a change of domicil, with reference to the right of suffrage. *State v. Judge of Ninth Judicial Circuit*, 13 Ala. 806 ; *Lincoln v. Hapgood*, 11 Mass. 350.

The fact that an elector is a soldier in the army of the United States, does not disqualify him from voting at his place of residence ; but he cannot acquire a residence, so as to qualify him as a voter, by being stationed at a military post, whilst in the service of the United States. *People v. Riley*, 15 Cal. 48 ; *Hunt v. Richards*, 4 Kansas 549 ; *Biddle v. Wing*, 1 Cong. Elect. Cas. 504. A student at a college, being of age, and otherwise qualified, and being also emancipated from his father's family, is entitled to vote by reason of his residence there. *Putnam v. Johnson*, 10 Mass. 488 ; *Farlee v. Runk*, 2 Cong. Elect. Cas. 87. See *Opinion of the Judges*, 5 Met. 587 ; *Cush. Elect. Cas.* 436. Paupers do not acquire a residence, so as to entitle them to vote, by living in an

(Payment of taxes.)

almshouse. *Monroe v. Jackson*, 2 Cong. Elect. Cas. 98. And so also, persons who reside on lands ceded to the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the state than that of serving civil and criminal process therein, do not, by such residence, acquire the rights of an elector. Opinion of the Judges, 1 Met. 580; *Sinks v. Reese*, 19 Ohio St. R. 306. And although an elector does not lose his residence by confinement in a prison, neither does he acquire one in the election district in which the prison is located. *Anon.*, 2 Brewst. 144. The thirty days' residence in a county required to entitle a citizen to vote, must be computed by excluding the day of the election. *People v. Holden*, 28 Cal. 124.

---

## CATLIN v. SMITH.

In the Supreme Court of Pennsylvania.

MARCH TERM 1816.

(REPORTED 2 SERGEANT &amp; RAWLE 267.)

[*Payment of taxes.*]

To entitle a citizen, otherwise qualified, to vote, on the ground of the payment of a state or county tax, it must have been assessed upon him, *individually*, at least six months preceding such election; it is not enough, that it was laid upon the county of which he is a resident.

It seems, that it is not required that such tax should be a personal or poll-tax. YEATES, J.

This was an action on the case by Charles Catlin, the plaintiff, against Samuel Smith, the defendant, to recover damages for the act of the defendant, as one of the inspectors of the election, in refusing to receive the plaintiff's vote, at a presidential election held in the city of Philadelphia on the 30th of October 1812.

The declaration set forth that the plaintiff was a native citizen of Pennsylvania, above the age of twenty-two years; that he had resided within the state for two years next before the said election, and within Walnut ward in the said city, for eighteen months prior to the



(Payment of taxes.)

same, and then resided therein; that on the 29th October 1812, he caused himself to be assessed by the assessor of said ward, for a county tax, which had been laid on the county, but not assessed upon him, at least six months before the said election; that having, on the said 29th October, paid the said tax, he offered himself to vote, and offered to prove the facts above related, to the satisfaction of the said defendant, but that the defendant refused to receive his vote, fraudulently intending to deprive him of his privilege. To this declaration the defendant demurred, assigning for cause, that, by the constitution of Pennsylvania, every citizen offering to vote must, within two years next preceding the election, have paid a state or county tax, which had been assessed at least six months before the election; whereas, by the plaintiff's own showing, the tax which he paid, had been assessed only the day before the election.

*Wallace and Rawle*, for the defendant.

*C. J. Ingersoll*, contra.

TILGHMAN, C. J. Charles Catlin, the plaintiff, has brought this action against Samuel Smith, the defendant, for refusing to receive his vote, at an election of electors of a president and vice-president of the United States. The defendant was an inspector of the election, and refused the plaintiff's vote, because the tax which he had paid prior to the election, had not been assessed on him six months before the election; the plaintiff had called on the assessor of his ward, and caused himself to be assessed personally, for a county tax, on the 29th October, and paid it the same day; the election was held on the 30th of October; the county tax had been *laid* more than six months before the election. The question depends on the first section of the third article of the constitution of the commonwealth, by which it is declared, that "every freeman, of the age of twenty-one years, having resided in the state two years

(Payment of taxes.)

next before the election, and within that time paid a state or county tax, which shall have been *assessed* at least six months before the election, shall enjoy the rights of an elector." In order to ascertain the meaning of the term "assessed," we must consider the mode of taxation prevailing at the time of adopting the constitution, and the sense in which that word had been used in prior acts of assembly.

The system of laying, assessing and collecting taxes, is to be found in the act of the 20th March 1724-5 (1 Dall. Laws 209). An account was to be taken of all persons and all property subject to taxation; the commissioners and assessors met, and made an estimate of the necessary expenses of the county for the ensuing year, and then the sum which each individual was to pay, either on account of his property or his person, was fixed, and this was called the *assessment* of each person. That the word "assessment" was used in this sense, will appear from several parts of the act, and particularly, from the 5th, 10th, 13th and 16th sections; in the 5th section it is said, that the assessors shall equally and impartially *assess* themselves and all others; the 10th section provides, that if any person or persons shall find him or herself aggrieved by any of the said *assessments*, supposing the same to be unequal, he or they may appeal to the commissioners; the 13th section speaks of collecting and receiving from the *persons assessed*, the several sums mentioned in the duplicates; and it is enacted in the 16th section, that if any person, *so rated or assessed*, shall neglect or refuse to pay the sum so assessed, it shall be lawful for the collector to levy on his goods, &c. The plaintiff insists that the constitution intends a tax laid and assessed on property and persons in general, at least six months before the election; but this will not accord either with the sense in which the words had been generally used, or with the reason for introducing them into the constitution. The voter is to have paid the tax assessed, not upon others, but

(Payment of taxes.)

upon himself; a tax assessed upon others, is no tax as to him.

Why was an assessment, six months prior to the election, deemed necessary? It was not merely to induce the citizens to pay their taxes; the object was of more importance; it was, to secure peace and certainty, and to prevent tumult and confusion at elections. Six months before the election, when the passions were not inflamed with the approaching contest, every man might give in his name to the assessors, and thus a register would be formed, showing, with certainty, every person "who was entitled to a vote;" but as the election drew near, the minds of men became heated, and great exertions were made, attended often with tumult, to procure votes, by causing persons who had no property to be assessed. I believe this often took place on the day of election, involved the inspectors and judges in difficulties, for want of time to ascertain the qualifications of men thus suddenly brought to the polls, and of course, was productive of altercation and hot blood. These were the evils to be prevented; and they will be prevented, if no person is permitted to vote, unless the tax was assessed on him six months before the election.

Our system of taxation has been altered, in some respects, since the adoption of the constitution; but the alteration is by no means opposed to my construction. The commissioners are to cause transcripts of the assessments to be transmitted to the assessors or collectors, on or before the second Monday in April in each year, so that the assessment is always completed six months before the general election, which is held on the second Tuesday in October. The assessment being thus closed, it has not been shown by what authority an assessor has afterwards exercised the right of assessing individuals, who have applied to him near the time of election; nor has it been shown how any assessment can legally be made without the intervention of the commissioners; yet, in the case before us, the assessor appears to have acted independently

(Payment of taxes.)

of the commissioners. I think proper to mention this, although my opinion is not founded on the irregularity of the proceeding; it would have made no difference in my mind, if the plaintiff had been assessed by the joint authority of assessors and commissioners. The assessment not having been laid *on him*, six months before the election, I am of opinion, that he had not the right of suffrage.

YEATES, J. The true meaning of the constitution of this state must decide the present case. The plaintiff has set out in his declaration that, being a native citizen of the commonwealth, above the age of twenty-two years, and resident therein for two years next before the day of election, and having caused himself to be assessed for a county tax, on the day preceding the election, and on the same day having paid the same tax, *which had been laid, but not assessed upon him*, more than six months before the said election, he did offer himself to the defendant, then inspector of Walnut ward in the city of Philadelphia, as one of the voters of the said ward, wherein he then resided, and offered to prove the said circumstances to the defendant, who absolutely refused him permission to vote. The defendant has demurred to the declaration, and has assigned for cause, that it is alleged therein, that the tax paid by the plaintiff was *assessed* only the day preceding the said election, and not six months before the same, as is required by the constitution and laws of this commonwealth. This election was held for the choice of electors, for the purpose of choosing a president and vice-president of the United States, at which the citizens qualified to vote for members of the general assembly were declared to be legal voters by the first section of the act of 2d February 1802. 3 Smith's Laws 483.

By the 7th section of the declaration of rights, under the former constitution of 1776, it is declared, "that all elections ought to be free, and that all freemen, having a sufficient evident common interest with and attachment

(Payment of taxes.)

to the community, have a right to elect officers, or to be elected into office." And by the sixth section of the frame of government, under that instrument, it is provided, "that every freeman, of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and *paid public taxes* during that time, shall enjoy the rights of an elector; provided always, that the sons of freeholders, of the age of twenty-one years, shall be entitled to vote, although they have not paid taxes." By the first section of the 3d article of our present state constitution, it is declared, that "in elections by the citizens, every freeman, of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax, which shall have been *assessed* at least six months before the election, shall enjoy the rights of an elector; provided, that the sons of persons qualified as aforesaid, between the ages of 21 and 22 years, shall be entitled to vote, although they have not paid taxes."

The object of these special provisions unquestionably was, in the language of the old constitution, to allow only those to give their suffrages, who "had a sufficient *evident* common interest with and attachment to the community," and who, therefore, must necessarily participate in the prosperous or adverse fortunes of the republic. But the question here is, whether the word "*assessed*," in this first section, is to be referred to a *general* or an *individual* tax? I clearly think it must be taken in the latter sense. The convention that formed the last constitution had the whole system of taxation before them, and state and county taxes were then in operation. They could not be ignorant, that *rates* and *assessments* were considered, in former laws, as synonymous expressions; as in the old "act for raising county rates and levies," passed 20th March 1724, §§ 5, 10, 16 (1 Dall. Laws 209); in the supplement thereto of 15th August 1732, § 2 (Ibid. 282); in

another supplement of 1st October 1779, §§ 1, 6 (Ibid. 807); and in the "act to raise effective supplies for the year 1782," passed 27th March 1782, §§ 9, 11, 18, 22 (2 Ibid. 4). The term assessment is frequently applied to the rates wherewith individuals are taxed, while the laying of a tax is made referable to the quotas payable by a county or township.

But why this sedulous attention in increasing the time of residence within the state from one to two years? Why were not the convention satisfied with the expressions in the former constitution, "paying public taxes within the year," as a pre-requisite in the voter? Was not the instrument modelled as we find it, to add to the security of the government, by the voter being required to give unequivocal evidence of his common interest with and attachment to the commonwealth? One otherwise qualified, who justly prizes the value of the elective franchise, can readily have his name enrolled by the proper officer, in his list of taxables, six months before the election; but it may lead to great abuses, if this may be procrastinated to the eve of an election. I cannot see the propriety of saying, that a citizen has paid a county tax, assessed within a given time, on his particular ward or township, unless his portion thereof has been previously fixed and made certain; besides, the word "assessed" implies in itself a lawful assessment, and a tax laid on the day immediately preceding the election (on the 29th of October) cannot be reconciled with the provisions in the 7th section of the act of 11th April 1799, "for raising and collecting county rates and levies." 3 Smith's Laws 394.

I feel myself fortified in my construction, from a careful perusal of the minutes of the convention that formed the constitution. On the 21st December 1789, the committee of nine members, appointed on the 11th December instant, reported the draft of a proposed constitution, wherein art. III., sect. 1, is as follows: "In elections by the citizens, every freeman, of the age of twenty-one

## (Payment of taxes.)

years, having resided in the state two years next before the days of the election respectively, and paid taxes within that time, shall enjoy the rights of an elector; the sons of freeholders, of the age aforesaid, shall be entitled to vote, though they have not paid taxes." Minutes of Convention 42. The convention having, afterwards, resolved itself into a committee of the whole body, the proposed constitution was fully debated, and many amendments were made therein. On the 2d February 1790, the first section of article 3d was debated and agreed upon in these words: "In elections by the citizens, every freeman, of the age of twenty-one years, having resided in the state two years next before the days of election respectively, and paid *public* state or county taxes within that time, which *tax* shall have been assessed *upon him*, at least six months before the election, shall enjoy the rights of an elector." Minutes of Grand Committee 81. The grand committee having reported the constitution agreed upon by them, the same was considered, article by article, in convention, and debated. The first section of the third article of the proposed plan of government being under consideration, on the 13th February following, the word "public" seems to have been omitted, as superfluous, and the word "tax" was struck out, on motion, the same having been put to vote; the clause in favor of the sons of persons qualified to vote, between the age of twenty-one and twenty-two years, was added in the close of this section; and with these amendments, the same was adopted by the convention. Minutes of Convention 93-5. On the 18th February, three members were appointed a committee (Mr. Wilson, Mr. Lewis and Mr. Findley) to revise and correct so much of the report of the committee of the whole, as had been adopted by the convention. Ibid. 113. They made report accordingly, on the 24th February, retaining therein the words "upon him," in the 1st section of the 3d article, as had been agreed upon in convention. Ibid. 129. In the second session of the convention, on 13th

August 1790, this section was considered and adopted, as it had been reported by the committee of three members, still retaining the words "upon him." Ibid. 154. And no other debate or vote was had on the 1st section of the 3d article afterwards; although the other sections of the same article were reconsidered. On the 21st August following, it was ordered, that Mr. Wilson, Mr. Lewis, Mr. Smith, Mr. Findley and Mr. Addison should be a committee to *revise, correct and arrange* so much of the constitution for the government of this commonwealth as had been adopted by the convention. Ibid. 176. And on the 30th August, the committee made their report, omitting the words "upon him," in the first section of the third article (Ibid. 198); which was adopted by the convention, and afterwards, on the 2d September 1790, signed by the members. Ibid. 216.

It cannot be contended, if the phraseology of the section had remained, as it had been agreed upon in the committee of the whole, revised by the committee of three members, and adopted in full convention on 13th August 1790, any doubt could have arisen on the construction thereof; because a tax paid by a voter, which had been assessed *upon him*, must, of necessity, be *individual*. Nor can it be conceived, for a single moment, that the special committee of five (of whom four were learned in the law, and three had been the former committee of revision) had the slightest intention of changing the sense of the instrument, respecting the right of franchise, as theretofore settled in debate; because they had no such delegated power; they were barely authorized to *revise, correct and arrange* so much of the constitution as had been previously adopted by the convention. Should I be permitted to hazard a conjecture, I should suppose that it struck the committee, that it might be questionable, whether the words "upon him," did not narrow the construction to a personal or poll-tax, and might lead to a doubt, whether a tax on property was included, and that by leaving out those words, it



(Payment of taxes.)

would clearly extend to both species of taxation. Be this as it may, it is certain, that although the other sections of the third article, after the report of the grand committee, and before the final adoption of the whole instrument, were reconsidered, no further debate or vote was had on the first section thereof. From the minute detail I have given of the proceedings in the convention, I am irresistibly led to conclude, that it was their true meaning, the payment of an *individual* tax, assessed at least six months before the day of election, should be an essential pre-requisite to entitle a person to vote, except in the case of the sons of persons properly qualified, between the ages of twenty-one and twenty-two years. Upon the whole matter, I am of opinion, that the demurrer has been supported, and that judgment must be entered for the defendant.

BRACKENRIDGE, J. The right to vote would seem to be considered as a great privilege, else why make the payment of a tax a *sine quâ non*, or pre-requisite of the privilege? The payment of a tax, which had been *apportioned* to the individual, six months before, is a *restriction of the privilege*; it is only in this point of view, that the limitation of *six months*, can be at all material; for there can be no evidence or criterion of residence that is intended, this being provided for, under the clause of the *two years* just preceding. It must have been to provide against the very thing that has here happened, a moneyed man procuring votes, on the spur of the occasion, by getting individuals assessed and paying a tax for them. In this point of view, it is anti-republican, and I am inclined to reject a construction that will have that operation. The constitution would seem to have thought (I mean the framers of it), and we are bound to think, with good reason, that the getting taxes paid for those who are not disposed to pay for themselves, was not a set-off, in good policy, against the weight it would give to men of property, in

elections, who could afford to procure votes in this way; if this was the reason of this provision in the constitution, it was good. Though it does not necessarily follow that this would be the effect, it is not the most probable, that an individual, barely for the sake of the public good, would come forward and get himself assessed, and pay a tax, at a late day, who had escaped assessment by the oversight of the assessor, or by his own concealment or evasion; it would be more likely, that it was at the instance of another, a man who could afford to regard money less than power, and had an interest in procuring votes according to the exigency. Admitting that an *esprit de corps* might lead, occasionally, a *sans culotte*, when a brother *sans culotte* had set up, to procure an assessment and pay a tax; in general, I take it, he would be more likely to let the rich man pay it for him, and be hauled up to the polls at the election. For this reason, I am against the construction, as aristocratic, and think the plaintiff in this case was not entitled to a vote.

Judgment for defendant.

---

It has been contended, as suggested by Judge Yeates, in *Catlin v. Smith*, that the constitution prescribes the payment of a poll-tax, as a pre-requisite of the right to exercise the elective franchise; but the argument of the learned judge shows that this idea was entirely excluded from his mind. The objection was raised in *Thompson v. Ewing*, 1 Brewst. 102-3, that a resident citizen who had paid a county tax assessed upon his real estate, was not a legal voter; but Judge Thompson held that this was such a tax as was contemplated by the constitution; that this was a personal assessment, and that he had complied with the requisitions of the law by making payment of it. The present constitution of Pennsylvania provides that the tax, of which the payment is one of the qualifications of an elector, shall have been assessed at least *ten days* before the election; but this does not require that facilities should be provided for the assessment of voters down to the tenth day preceding the election; it is a restriction, not an injunction;

## (Payment of taxes.)

and therefore, a registry law that does not provide for such assessment, is not, on that ground, in violation of the constitution. *Patterson v. Barlow*, 60 Penn. St. R. 81. It is the right of a citizen who is assessed for both a state and county poll-tax, to pay either of them, in order to entitle himself to exercise the rights of an elector, and the receiver of taxes is not justified, in refusing to give a receipt for the one, without payment of the other; it is competent, however, for the legislature, in authorizing the appointment of deputy-receivers, for the convenience of the electors, to provide that they shall collect both the state and county taxes; and a citizen is not deprived of any constitutional right, by not being allowed to pay one of his taxes to such deputy; if he wish to do so, he must seek the office of the principal receiver, and tender his tax to him. *Commonwealth v. Peltz*, 1 Brewst. 159. The payment of a state or county tax, by one otherwise qualified, entitles him to vote, though such tax were illegally assessed upon him. *Humphrey v. Kingman*, 5 Met. 162. And although a tax, which is assessed upon one person, be paid for him by another, without his previous authority, yet, if he recognise the act, and promise to repay the amount, on the ground that such person acted as his agent, he thereby acquires the right to vote, the same as if he had paid it with his own hand. *Ibid.* And see *Draper v. Johnston*, 1 Cong. Elect. Cas. 702. In Massachusetts, persons exempted from payment of poll-taxes, by reason of old age, are not entitled to vote, unless they have paid a property tax. Opinion of the Judges, 5 Met. 591.

## COMMONWEALTH v. READ.

In the Court of Common Pleas of Philadelphia.

JUNE TERM 1839.

(REPORTED 2 ASHMEAD 261.)

[*Validity of a minority election.*]

If a quorum of the proper body be present, and a majority of them either refuse to vote, or vote in a manner different from that prescribed by law, a minority, composed even of a single member, is sufficient to make a valid election.

If the law require the vote to be by ballot, and the majority vote *viva voce*, a single ballot, if given and received as such, is sufficient to elect.

This was a *quo warranto* to test the right of the defendant to exercise the office of treasurer of Philadelphia county. Issues of fact having been joined, the case was submitted to a jury, after a discussion of the questions of law by the respective counsel, under the charge of the court.

*St. George T. Campbell*, for the relator.

*Goodman, Raybold* and *W. B. Reed*, for the defendant.

KING, P. J. The proceeding in which we are engaged, is technically termed a *quo warranto*. It is prosecuted by the commonwealth, at the suggestion of Hugh Clark, against the defendant, George Read, and requires of the latter to show by what authority he claims to exercise the office of treasurer of Philadelphia county.

By a general law of the commonwealth, passed on the 15th of April 1834, the commissioners of each county are annually to appoint a respectable citizen as county treasurer. \* \* By the act of the 16th June 1836, the county-board for the city and county of Philadelphia, for the

(Validity of a minority election.)

time being, are to meet at the county commissioners' office, on the first Monday in June 1837, and on the first Monday of June in every second year thereafter, between the hours of two and six o'clock in the afternoon, and then and there elect by ballot, a county treasurer, to serve for two years from the said election, who shall perform the duties and incur the liabilities now prescribed by law for the said treasurer. The sole operation of this law, therefore, being to change the body electing the treasurer of Philadelphia, and to extend the period of his official term; leaving him in all other respects charged with the duties and subject to the obligations imposed by the general law upon other county treasurers.

The county-board to whom, by the act of 1836, the power of making choice of the county treasurer, is thus transferred from the commissioners, is composed of the members of the senate and house of representatives, representing the city and county of Philadelphia in the general assembly. To constitute a quorum of this board, a majority of the whole number of city and county members is requisite. By a joint resolution of the legislature, passed on the 27th of March 1839, the time of electing the county treasurer by the county-board, was changed from the first Monday of June to the second Wednesday of April 1839.

Thus stood the law on the 10th of April last, when the alleged election of the defendant took place. On that day, all the members of the county-board, being in number twenty, assembled at the commissioners' office, and organized for the dispatch of business, by the appointment of one of their body as president, and of a citizen as secretary. A motion being made to proceed to the election of treasurer by ballot, it was amended, so as to make the election *vivâ voce*, by a vote of eleven for, to nine against the amendment, and the resolution as amended prevailed; against the adoption of this amendment, several of the members protested, as a direct infraction of the law under

(Validity of a minority election.)

which they assembled, which, in terms, required the election to be *by ballot*; their remonstrances were, however, ineffectual; two of the members being appointed tellers, the board proceeded to make choice of a treasurer *vivâ voce*. The result was, ten votes *vivâ voce* for George Read, and nine votes *vivâ voce* for John Thompson. While, however, the voting was in progress, and when the name of Abraham Miller, a member of the senate, representing the city, was called, that gentleman came forward to the chair, and tendered his vote by ballot, affirming, at the same time, that any other mode of voting being illegal, he would not participate in it. Whether this vote was accepted or rejected, is a question of important influence in the decision of the cause, and your attention will hereafter be particularly called to it.

In regarding the legal character of these proceedings, we will first consider the effect of the votes given to the defendant *vivâ voce*; and secondly, the legal effect of the ballot vote tendered by Mr. Miller, if that vote was received by the board.

In reference to the first subject of consideration, our duties are free from embarrassment; both parties concur in repudiating the *vivâ voce* votes as illegal.\* The relator rests his case mainly on that ground; and the defendant, as distinctly, disclaims holding his office on such an election. (The learned judge here proceeded to dispose of an objection to the constitutionality of the act of assembly, and continued:) For the reasons, however, assigned, we are of opinion, that the law of 1836, giving the county-board power to elect the county treasurer, is constitutional; and that this power can only be exercised in the manner prescribed by law: hence, it follows, that the votes given *vivâ voce* for George Read are mere nullities; that he could not have been chosen by such votes, even had they been unanimous; and that if he has no better claim to the

\* See *Foster v. Scarff*, 15 Ohio St. R. 535.

(Validity of a minority election.)

office he exercises than that which he derives from such an election, the law of the land makes it your duty to find the issue against him, and in favor of the commonwealth.

This brings us to the second subject of consideration connected with the doings of the county-board; we mean, the legal effect of the vote by ballot, said to have been given by Mr. Miller. Admitting for the present, that Mr. Miller tendered such a vote; that it was received; and that no other legal vote was given; what result would legally follow?

We concur in opinion with the relator's counsel, that the county-board is a *quasi* corporation, and as such, it is governed by the fundamental rules which the common law has provided for the better government of corporate bodies, and for the proper exercise of the corporate functions. The rule immediately applicable to the case before us, is that found in the case of *Rex v. Foxcroft*, 2 Burr. 1017, decided in 1760. There, the elective body consisted of twenty-five; and out of this number, twenty-one assembled; nine of these persons voted for Thomas Seagrave, as town-clerk; but twelve of them did not vote at all, and eleven protested against any election at that time. The question arising, whether Seagrave was or was not elected, it was held by the court of king's bench, that he was duly chosen; that the protesting electors had no way to stop the election, when once entered on, but by voting for some other person than Seagrave, or at least, against him; and that, whenever electors are present, and do not vote at all, they virtually acquiesce in the election made by those who do. Again, it has been held, that if the corporate assembly be duly convened, and the majority vote for an unqualified person, after notice that he is not qualified, their votes are thrown away, and the person having the next majority, and not disqualified, is duly elected. 1 Willcock on Corporations § 547; *Claridge v. Evelyn*, 5 Barn. & Ald. 81. The New York cases cited in the argument

(Validity of a minority election.)

rest on the same principles, which are also alluded to and recognised by our own supreme court in the recent case of *Commonwealth v. Green*, 4 Whart. 531.

The doctrine of these cases I do not understand to be contravened by the relator's counsel; who, however, contends, that although electors who refused to vote, are considered as assenting to the doings of those who do vote, yet that, to make such an election effective, a quorum of the elective body must be present, and that the presence of such a quorum can only be evidenced by a number equal to such a quorum actually voting. To authorize the county-board to proceed to the election of treasurer, it is necessary that at least eleven members of the twenty comprising it, should be present; but, if the majority of those present either refuse to vote, or vote in a manner different from that prescribed by law (as by voting *viva voce*, when the law requires them to vote by ballot), we are of opinion, that a minority, composed even of a single member, is sufficient to make an election, and that consequently, the presence of a quorum, when such an election is said to have taken place, is not required to be proved by the legal votes actually given, but may be established by other proof, like any other fact in the cause. The wisdom of the rule is manifest, and without it, it would be difficult, if not impossible, to transact the business of a large deliberative assembly. If a majority of the elective body in a corporation, or *quasi* corporation, such as the county-board is on all hands regarded to be, could prevent an election, either by refusing to vote, or, what is the same thing, refusing to vote in the manner provided by law, the business of such bodies could not progress, and their legal existence would be put in jeopardy. In all our public elections, those who neglect or refuse to vote according to law, are bound by the votes of those who do vote, no matter how small a minority those who vote are of the whole constituency. It is an historical fact, that about forty thousand electors who voted for one or the



(Validity of a minority election.)

other of the candidates for governor at the late election, did not cast any vote for or against the amended constitution; and yet, that instrument has, by a comparatively small minority, become the supreme law of the land. The result of our opinion is, that if you are satisfied from the evidence, that Abraham Miller tendered a vote by ballot, for the defendant, and that his vote by ballot was received as such, then has the defendant sustained his plea of having been, on the first of April last, duly elected county treasurer.

This then is the great turning question of the cause; and being a question of fact, is for your decision. The statement of Mr. Miller is clear and distinct, in this particular: he says, that after protesting and voting against the amendment which ordered the election to proceed *vivâ voce*, he finally voted for the resolution, as amended, to proceed to the election: that when his name was called, he walked up to the table, where the teller sat, and presented a ballot: that he was not quite certain, whether he presented it first to the chairman or not, but that it was in the hands of the chairman: that he then said, I offer this ballot; it is the only legal vote, and the only vote I shall offer: that the chairman appeared to hesitate, and some member proposed that he (Mr. Miller) should read it: that he refused, and said he would claim the ballot privilege in its fullest extent: that, the hesitation of the chairman continuing, he asked for his decision, whether it should or should not be received; and that, after some consultation with the members, the chairman (Mr. Heston) decided it could not be taken: that he then protested against this violation of his rights, before all present, and left the room. He further states, that he was not quite certain, whether Mr. Heston, the chairman, did or did not read his ballot before he decided; but that he thought, that when he held his ballot, it was in the same form, as when he handed it to him; that he voted for George Read.

The statement of this most respectable and intelligent

(Validity of a minority election.)

gentleman, who may fairly be presumed to know as much of the fate of his own ballot as any one else, while it clearly proves a tender of it, seems as clearly to negative all idea of its reception. In the testimony of the other gentlemen examined, there are to be observed the ordinary differences which take place among individuals of equal intelligence and integrity, detailing the same transaction. On such occasions, the attention of one being directed to one part or position of the subject of inquiry, and of the other to a different point of view of the same thing, there will be a necessary difference in the *minutiæ* of their testimonies. The numerical weight, however, of the witnesses both for the plaintiff and the defendant, would seem to sustain the statement of Mr. Miller, that his ballot, though tendered to, was not received as a ballot by the chair.

This is, however, as we have said, the great question of the cause, and was properly so treated by the counsel who conducted the argument for both the parties litigant. Being a question of fact, it is exclusively for your decision. If you are satisfied, from a careful view of the evidence, that the ballot vote of Abraham Miller was received at this election, then, in the opinion of the court, being given for George Read, it was sufficient, under the facts disclosed in the case, to elect him county treasurer. If, on the contrary, the aggregate of all the testimony of all the witnesses convinces your understandings, applied as they ought to be to nothing else than the law and the facts of this case, that the vote of Mr. Miller, though offered by him, was not received, then no legal election of county treasurer took place in April last. The office in that case is vacant; and the county-board, or if, as is said, the power has since returned to the commissioners, then the latter, must assemble and elect a county treasurer according to law. If you should be of opinion that the vote of Abraham Miller was not received, of course, your duty terminates, and the verdict must be for the commonwealth.

(Validity of a minority election.)

(Having commented on the other issues raised by the pleadings, which are of no public interest, the learned judge concluded his charge by again calling the attention of the jury to the essential question in the cause, namely, whether the ballot of Abraham Miller was or was not received as such by the county-board, and said :) It is the correct solution of this question that will substantially decide whether George Read is or is not the Treasurer of Philadelphia county. If this ballot was tendered and received as a ballot vote, then the verdict should be, on the issue of election or non-election, in favor of the defendant. If, on the contrary, the vote was not received as a ballot, though tendered as such, then the verdict should be for the commonwealth.

Verdict for defendant.

---

There can be no doubt of the application of the principle of *Commonwealth v. Read*, when the elective body consists of an indefinite number of persons; and accordingly, in *State v. Binder*, 38 Mo. 450, it was held, that in the absence of any evidence to the contrary, it will be presumed that the voters, voting at an election, were all the legal voters of the city, or that those who did not see fit to vote acquiesced in the action of those who did vote, and consequently, are equally bound and concluded by the result of the election.

But as applied to the case of a body composed of a definite number, there is more doubt, yet the English authorities appear decidedly to sustain the doctrine of the principal case. Thus, in *Rex v. Withers*, Pasch. 8 Geo. II., cited in Cowper 537, and 2 Burr. 1020, five voters out of eleven, voted for the defendant, upon a single vacancy of a burgess for the borough of Westbury, and six others voted for two persons jointly; but the court of king's bench held that the double votes were absolutely thrown away, and refused to grant an information against the defendant. And in *Rex v. Foxcroft*, 2 Burr. 1021, Lord Mansfield said: "Whenever electors are present, and don't vote at all (as they have done here), they virtually acquiesce in the election made by those who do."

A modern case has somewhat restricted this doctrine in the English courts; for in *Regina v. Guardians of St. Martin's in the Fields*, 5 Eng.

(Disqualifications for office.)

L. & Eq. 361, the court of queen's bench determined that, where the law required the election to be by a majority of the guardians present, and the meeting at which the election of a clerk was held, consisted of the chairman and twenty-one members of the board, an election by the votes of eleven members (the chairman not voting) was invalid, Lord Campbell saying, that the judges were all of opinion that the chairman must be considered present at the election, and consequently, the person declared elected had not a majority of the twenty-two guardians present.

---

## COMMONWEALTH v. SHAVER.

In the Supreme Court of Pennsylvania.

MAY TERM 1842.

(REPORTED 3 WATTS &amp; SERGEANT 338.)

*[Disqualifications for office.]*

The trial and conviction of a sheriff, of the offence of bribing a voter, previously to his election to the office, does not constitutionally disqualify him from exercising the duties thereof; it is not a "conviction of misbehavior in office, or of any infamous crime," within the meaning of the constitution."

This was a *quo warranto* issued on the relation of Jacob Africa against John Shaver, to inquire by what authority the defendant exercised the office of sheriff of the county of Huntingdon.

In October 1841, the defendant was elected sheriff of the county of Huntingdon, and was commissioned on the 3d November 1841. At the January sessions 1842, he was tried and convicted of the offence of bribing one Christian Coutts, prior to his election, to vote for and support him for the office of sheriff; and at the April sessions following, he was sentenced to pay a fine of \$100, and to undergo an imprisonment for one month in the county jail. The governor, thereupon, on the 18th April 1842,

(Disqualifications for office.)

issued a *supersedeas* revoking his commission; but as he still continued to exercise the duties of the office, and to take and receive its emoluments, this writ of *quo warranto* was sued out by the attorney-general.

*Johnson*, Attorney-General, with whom was *Ayres*, for the relator.

*Miles* and *Bell*, for the defendant.

KENNEDY, J., delivered the opinion of the court. The point to be decided in this case arises out of the ninth section of the sixth article of the constitution of the state, which is in the following words: "All officers for term of years shall hold their offices for the terms respectively specified, only on the condition, that they shall so long behave themselves well; and shall be removed on conviction of *misbehavior in office*, or of any *infamous crime*." It is very clear, that sheriffs, as well as all other officers holding their respective offices for a term of years only, are embraced within this provision of the constitution, so that the respondent, though duly elected and commissioned to the office of sheriff, cannot claim to hold it, after he has been convicted of *misbehavior in it*, or of any *infamous crime*. But has he been convicted of either the one or the other of these offences? is the question which remains to be solved.

As to *misbehavior in office*, it is perfectly manifest, that he has not even been charged with, much less, convicted of it. But it has been urged, and indeed, strenuously too, on behalf of the commonwealth, that he has been *convicted of an infamous crime*. That he has been convicted of an offence of great public concern cannot be denied; for, it unquestionably is of vital importance to the best interests of the republic, that the purity and freedom of the election of all its officers should be preserved, and kept free from every species of improper bias or corruption. In order, however, to determine whether

(Disqualifications for office.)

the crime of which the respondent has been convicted, be *infamous* within the meaning of the constitution, or not, it becomes necessary to examine and ascertain first, what the framers and makers of it meant by the words "infamous crime." For, although we may think, that the offence of which the defendant has been convicted, is such as ought to disqualify him for holding the office, yet we are not to let our private feelings or sentiments influence or govern us in deciding this point. Instead of submitting to such an influence, it is our bounden duty, after a careful examination of the question, to determine it according to what we believe was intended by the makers of the constitution, which must be regarded as the law on the subject. Before proceeding, however, to ascertain this, it may be proper to observe, that we have no act of assembly which goes to render the commission of the respondent void, for or on account of the offence committed by him; whether, therefore, his commission can be considered void, or he removed from his office, by reason of his having committed and been convicted of the offence of bribery in canvassing for it, depends entirely upon the true meaning and import of the words of the constitution in respect to the same.

If, upon examination, it shall be found, that the words "infamous crime" have received, in law, a fixed and definite meaning, it will certainly furnish strong, if not conclusive ground, for holding that such must have been the meaning which the makers of the constitution intended should be affixed and given to them; and more especially ought we to come to this conclusion, if it shall be found impracticable to discover and lay down any other rule by which crimes may be determined, with reasonable certainty, to be *infamous* or otherwise. For, although an officer may, in a popular sense, be said to have rendered himself *infamous*, by the general tenor of his immoral conduct, without having rendered himself liable to a criminal prosecution and punishment, at law, yet, it is very clear, that the makers of the constitution did not intend that the word "infamous" should be applied to

(Disqualifications for office.)

any officer, so as to cause him to be removed from office, however immoral his conduct may have been, unless he has been guilty of some offence that is made punishable by law; because, by the express terms of the provision, he is not to be removed from office, without a previous *conviction*, which can only be, when the offence committed by him is such as is made punishable by law. He may, therefore, have become *infamous* in the general estimation of the world, by having rendered himself *odious* and *detestable* (which is one of the meanings given by Mr. Webster, in his Dictionary, to the word "infamous"), without having made himself liable to a prosecution and conviction at law for his misconduct. Indeed, he may be so notoriously and entirely destitute of truth, as to be altogether unworthy of credit, even when called to testify on oath, and yet never have been guilty of perjury or any other indictable offence. In short, there are also many evil practices of which a man may be guilty, beside that of lying (which may be said to lie at the root of almost all moral obliquity), for which he cannot be indicted or punished by law, and yet they are sufficient to render him *infamous* in the estimation of the more intelligent and virtuous portion of the community. They are so numerous, it would be difficult to enumerate them all; and at the same time, so various, that there might probably be some diversity of opinion whether they ought to be regarded as attaching *infamy* to the person.

But since, according to the express terms of the provision in the constitution, it is only on *conviction* of the officer, either of *misbehavior* in his office, or of some *infamous crime*, that it is declared he shall be removed from his office, it would, therefore, seem as if the makers of the constitution intended that the law in force for the time being, should determine whether the crime was *infamous* or not. If this had not been intended, it is reasonable to conclude, that they would have given some explanation of what they meant by the term "infamous;" but not having

(Disqualifications for office.)

done this, we are left to infer, very fairly, that they intended to use it in its legal acceptation, which was settled and known, and therefore, rendered all explanation unnecessary. Besides, the words "infamous crime" are properly a legal phrase, and are, therefore, to be taken in their legal sense, unless, from the context, it appear that such was not the intention, which cannot even be pretended to be the case here; but the contrary would seem to be most clearly indicated, by the use of the word "conviction."

It becomes necessary, now, to ascertain the legal import of this phrase. Mr. Webster, who, in his Dictionary, adopts the meaning given by the Encyclopedia to the word "infamy," says, "in law," it means "that loss of character or public disgrace which a *convict* incurs, and by which he is rendered incapable of being a *witness* or *juror*," and accordingly, in Tomlin's Law Dictionary, in explaining the same term, it is laid down, that *infamy* extends to forgery, perjury, gross cheats, &c., and disables a man to be a witness or juror. It has unquestionably been clearly settled, that the conviction of a person of an *infamous crime*, renders him incompetent to be a witness thereafter; but the conviction of a crime, considered not infamous at common law, has never been held, unless by statute, sufficient to disable him from being a witness. See Co. Lit. 6 b; Com. Dig., tit. Testimony, A, 3, 4; Clancey's Case, Fortescue 208; Baring v. Shippen, 2 Binn. 165; 1 Phil. Ev. 24-5; Bushel v. Barrett, Ry. & Mood. 434; s. c. 21 Eng. C. L. Rep. 483. The offences which disqualify a person to give evidence, when convicted of the same, are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attain of false verdict, and other offences of the like description, which involve the charge of *falsehood*, and affect the public administration of justice. 2 Hale, P. C. 277; Com. Dig., tit. Testimony, A, 3, 4; Co. Lit. 6 b; 1 Phil. Ev. 20-2; 2 Russell on Crimes 502-3.\*

\* And see Barker v. People, 20 Johns. 457.



(Disqualifications for office.)

So bribery, taken in a somewhat restricted sense, may be regarded as an *infamous* offence, and for that reason, renders the party convicted of the same, an incompetent witness; as, for instance, in the case of receiving or offering any undue reward by or to any person whatsoever, whose *ordinary profession or business relates to the administration of public justice*, in order to *influence his behavior in office*, and *incline him to act contrary to the known rules of honor and honesty*. 1 Hawk. P. C. ch. 67, § 2; 3 Inst. 145; 4 Bl. Com. 139; 1 Russell on Crimes 156. Though, in Clancey's Case, Fortescue 208, where, after great deliberation, a conviction of bribing a witness to absent himself and not give evidence, was held to be an *infamous* offence by seven of the judges, and for that reason, rendered the party incapable of giving evidence, that great and distinguished judge, Lord Holt, then chief justice of the king's bench, doubted the propriety of the decision. The ground of the decision in Clancey's Case, was, that the purpose of the bribery was to *obstruct and pervert the administration of public justice*, by preventing the truth from being made known. The same ground was adopted in a late case of *Bushel v. Barrett*, Ry. & Mood. 434; in this latter case, the objection to the witness was, that he had been convicted of a conspiracy to bribe a person, summoned as a witness (on an information for an offence against the revenue laws), not to appear before the justices of the peace, who were to investigate the matter and decide on it; and it was held by the court, according to the principles of Clancey's Case, that he was rendered incompetent by the conviction. And it is perfectly clear, from what the court say in this latter case, as also in the case of Clancey, that it was not because the party had been convicted of bribery or a conspiracy to bribe, that he was rendered infamous, and therefore, incompetent to give evidence; but because he had become so, on account of the object that was intended to be effected by means of the bribery, which was that of *obstructing and perverting the administration of public justice*.

(Disqualifications for office.)

But corrupt and illegal practices in giving rewards or making promises, in order to procure votes in the elections of members to serve in parliament, although in a more extended sense denominated bribery, and punishable at common law (*Rex v. Pitt*, 3 Burr. 1335, per Lord Mansfield), have never been held to render persons convicted thereof, infamous, or incapable of giving evidence, or serving as jurors. Indeed, I think I may say, it has never occurred to any one, to make the objection as founded upon the principles of the common law; which, of itself alone, is very powerful, if not conclusive evidence, to show that such corrupt and illegal practices were never considered *infamous crimes*. Statutes, however, have been passed in England, as also in some of the United States, rendering persons convicted of bribery at elections, incapable of holding thereafter any office or franchise, or of voting at the same. See 1 Russell on Crimes 156 and note *a*. The passage of these statutes also furnishes strong evidence that a conviction at common law did not work any disqualification to hold office or give evidence; otherwise, the passage of them would have been unnecessary.

But it has been said by the counsel for the commonwealth, that it properly belongs to the governor to settle and decide the question that is presented here; that he has already determined that the defendant, by reason of his conviction, is no longer entitled to hold the office of sheriff; and that the decision of the governor, thus made, is binding and conclusive upon this court. It would seem, that the governor did entertain the opinion that the defendant had become incapable of holding the office; but whether for the same cause that is now assigned on the part of the commonwealth, may be questionable, because we have before us a copy of what is called a *supersedeas*, issued by him, bearing date the 18th April 1842, directed to the defendant, wherein, after reciting that the defendant had been duly commissioned sheriff of the county of Huntington, and that he afterwards had been convicted, at

(Disqualifications for office.)

January sessions 1842 of the court of quarter sessions of said county, of a misdemeanor, and sentenced by the said court, on the 16th April 1842, only two days anterior to the issuing of the *supersedeas*, to pay a fine of \$100, and to undergo an imprisonment for one month in the jail of said county, the governor declares, that *for the cause thus stated*, it fully appears to him, that the defendant *had not behaved himself well in the said office*, and therefore, ought not any longer to exercise the said office of sheriff conferred upon him; and then he, the governor, thereby revokes, annuls and supersedes the defendant's commission of sheriffalty. Now, it is very apparent, from the face of the *supersedeas*, that the governor had been given to understand, in some way or other, that the defendant had been *convicted of misbehavior in office*; for he says expressly, that it appeared fully to him, from the conviction, which he recites as being of a misdemeanor, that the defendant *had not behaved himself well in his said office of sheriff*; whereas, it appears plainly, from the exemplification of the record, produced here, of the only conviction that is alleged to have taken place against the defendant, that it was *not* for misbehavior in office, or anything of the sort, but for bribing an elector to vote for him as a candidate for the sheriff's office, before he obtained it. Hence, I am inclined to believe, that the governor could not have derived his information of the conviction upon which he acted from a regularly certified copy of the record thereof, which ought to have been furnished to him, or otherwise he would not have fallen into such an error, it being one of fact simply, which required no legal knowledge or acumen in order to guard against it. Then, supposing it was a matter upon which he was authorized to pass conclusively, it would appear that he decided upon a case altogether different from that which is presented to us; and it would seem to have been one, too, which never existed; and therefore, cannot be considered as having any effect upon the present.

(Disqualifications for office.)

But the governor's action in this case cannot be said to partake, properly speaking, of a judicial character; for, it was *ex parte*, without any previous notice whatever to the defendant; and it would, therefore, be unreasonable in the extreme, to regard it as conclusively binding upon the rights of the defendant. Besides, I am not satisfied, that the governor has any power to issue any other species of *supersedeas*, when a vacancy takes place in the sheriff's office, than that of a new commission to fill it until the next general election, which he is authorized to do by the first section of the sixth article of the constitution; this, at least, I think, may be considered as the only *supersedeas* which he is *expressly* authorized to issue by the constitution.

The argument that the defendant's confinement, under the sentence of the court, rendered it impracticable for him to execute the duties of his office in person, and therefore, he ought to be considered as virtually removed from it, does not seem to merit notice; for, as well might the same effect be said to have been produced, if his confinement had been caused by sickness; in either case, all the duties that could not be performed by him personally, he would have discharged by his deputy. Nor is the argument that the defendant could not have the charge of the jail of the county, while he himself was a prisoner in it, seeing this would have been leaving it to his own will to have his sentence carried into effect, or not, as he pleased, entitled to any greater respect; because it was altogether feasible for the coroner, who had the defendant in charge, to have an exclusive control over part of the jail, for that purpose; or, if the building used as a jail, in the county, would not admit of that, he could, as it would have been his duty, have procured an apartment in another building, or the whole of another building, if requisite, for the purpose of confining the defendant in it; for, the jail in a county, does not, of necessity, consist of one entire building alone; two or more may be obtained and occupied for

(Disqualifications for office.)

that purpose, whenever the exigency of circumstances, whether accidental or otherwise, shall render it necessary.

Judgment is, therefore, rendered for the defendant; and that he recover his costs of Jacob Africa, the relator.

Judgment for defendant.

---

Where the law confers upon a municipal legislative body the power of judging of the qualifications of its own members, it has been held, that they have exclusive jurisdiction to determine whether one of their members has or has not vacated his seat by accepting a disqualifying office; and that the courts have no jurisdiction in the premises. *Commonwealth v. Loughlin*, 20 Leg. Int. 100; *Commonwealth v. Barger*, *Ibid.* 101. It seems, that where a city charter requires one of its officers, in the execution of his official duties, to reside without the territorial limits of the corporation, he does not thereby lose his qualification for another office which requires a two years' residence previous to the election; the doctrine seems to be, that if the office be irrevocably conferred for life, the law fixes the domicile at the place where the functions are to be performed; but that, if it be temporary or revocable, the presumption is against a change. *Commonwealth v. Jones*, 12 Penn. St. R. 365, per Gibson, C. J. It has been decided that, under a statute which disqualifies persons "holding an office under the government of the United States," from serving in a municipal office, a deputy-marshal is incompetent; he is a recognised officer of the United States. *Commonwealth v. Ford*, 5 Penn. St. R. 67. "There is no state in the union," said Mr. Justice Burnside, in that case, "whose people and government have been more jealous of state rights than the people and government of Pennsylvania." The word "eligible" relates to the capacity of holding as well as the capacity of being elected to an office. *Carson v McPhetridge*, 15 Ind. 327. See Cushing's *Lex Parl. Am.* § 78.

## COMMONWEALTH v. CLULEY.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1867.

(REPORTED 56 PENNSYLVANIA STATE REPORTS 270.)

[Majority for disqualified person.]

Where, at an election for sheriff, a majority of the votes are cast for a disqualified person, the next in vote is not to be returned as elected.

Rule to show cause why a *quo warranto* should not issue, on the suggestion of J. Y. McLaughlin, against Samuel B. Cluley, to show by what warrant he held and exercised the office of sheriff of Allegheny county.

The suggestion set forth that at the general election held on the 9th of October 1866, Cluley received 19,915 votes for the office of sheriff, and McLaughlin received 12,925 votes for the same office; that Cluley was commissioned on the 12th of November 1866, notwithstanding he had been commissioned for the same office on the 28th of August 1863, and had discharged its duties until the first Monday of December 1866, and could not lawfully be commissioned as sheriff of the same county twice in six years, under the 1st section of the 6th article of the constitution of Pennsylvania.

*J. K. Kerr, R. B. Roberts and W. H. Lowrie*, for the relator.

*T. M. Marshall and J. Veech*, for the respondent.

STRONG, J., delivered the opinion of the court. A writ of *quo warranto* is not a writ of right. Even our act of assembly of June 14th, 1836, recognises this; it enacts that such writ *may* be issued by the supreme court in all cases in which the writ of *quo warranto* at common law

(Majority for disqualified person.)

may have been issued, and in which the court had, before the passage of the act, the power of granting informations in the nature of such writ. The British statute of 9 Ann. ch. 20, was not, at first, adopted in this state; it was not reported in force by the judges; but its provisions were incorporated into our revised code.

Under the British statute, it was always held to be within the discretion of the court, whether to grant or withhold an information in the nature of a *quo warranto*, and the court acknowledged themselves bound to exercise a sound discretion upon consideration of the particular circumstances of each case. This was said by Lord Mansfield in *Rex v. Wardroper*, 4 Burr. 1964; and the same rule was recognised in *Rex v. Dawes*, 4 Burr. 2022, and in *Rex v. Sargent*, 5 T. R. 466; and there are cases in which courts have refused leave to file an information, at the suggestion of a private relator, even when a valid objection to the defendant's title has been shown. *Rex v. Parry*, 6 Ad. & Ellis 810; 2 N. & P. 414. Nor has this court, since the act of 1836, adopted any other rule. In *Commonwealth v. Jones*, 12 Penn. St. R. 365, the British practice was recognised as the rule with us; and though it has since been decided, that it is not indispensable that a rule to show cause should be obtained, before the writ can issue, no decision has been made that this court is obliged to entertain such writ, if, in their opinion, it was improvidently issued. The issue of the writ does not end the discretion of the court.

Before the act of 1836, informations in the nature of *quo warranto*, at the instance of a private relator, were always required to be with leave of the court, and leave was not granted, except upon application of a competent relator. No one was held competent who had not a sufficient interest to warrant his interference; and our statute has made no change in this particular. Its second section gives to courts of common pleas concurrent jurisdiction with the supreme court, in five classes of cases; the first

(Majority for disqualified person.)

three relate to municipal and other corporate offices; and the act provides that, in such case, the writ may be issued upon the suggestion of the attorney-general, or his deputy in the respective county, or of any person or persons desiring to prosecute the same. The other two classes relate to usurpations of corporate rights, or forfeitures of corporate privileges. As the act was reported by the commissioners to revise the civil code, it was drawn so as to provide that writs in such cases should be granted only upon the suggestion of the attorney-general or his deputy. The legislature, however, altered the provision, and enacted that writs in these cases, as in the others, might be issued upon the suggestion of any person or persons desiring to prosecute the same.

But the statute of 9 Ann. allowed informations at the relation of any person desiring to sue or prosecute them; and under that statute, the rule was, that a private relator must have an interest. Our act, which substantially incorporates the provision of the British statute, has received the same construction; this court has construed the words "any person or persons desiring to prosecute the same," to mean any person who has an interest to be affected; they do not give a private relator the writ, in a case of public right, involving no individual grievance. This was ruled in *Commonwealth v. Allegheny Bridge Co.*, 20 Penn. St. R. 185; in *Murphy v. Farmers' Bank*, Ibid. 415; and *Commonwealth v. Railroad Co.*, Ibid. 518. And it is to be observed, that the legislature has placed all the five classes of cases on the same footing, in this particular; if a private relator cannot sue out a writ to enforce a forfeiture, without having an interest, the statute gives him no greater right, when he complains of usurpation of a county or township office; the right of a relator in each class of cases is defined by the same words.

The relator, in the present case, suggests that Samuel B. Cluley now usurps, intrudes into and unlawfully holds the office of high sheriff of Allegheny county; that at the

/



(Majority for disqualified person.)

general election on the 9th day of October 1866, an election was held for sheriff of said county; that at the election, the said Cluley received 19,915 votes, and the relator received 12,925 votes for the said office; that the vote was certified to the governor, and that Cluley was commissioned sheriff; and that he has since acted as such, notwithstanding the fact, that he was commissioned sheriff of said county on the 28th of August 1863, and discharged the duties of the office, from that time until the first Monday of December 1863.

Now, on this showing, what interest has the relator in the question he attempts to raise? What more than any inhabitant of Allegheny county, or of the commonwealth? He was a rival candidate, at the election, for the office; but he was defeated, with a majority against him of 6990. Doubtless, if his successful rival is incapable of holding the office, on account of the constitutional provision "that no person shall be twice chosen or appointed sheriff, in any term of six years," or for any other reason, and that incapacity entitles him, the relator, to the office, he has an interest. He certainly can have none, if a judgment of ouster against Cluley, would not give the sheriffalty to him. But surely, it cannot be maintained that, in any possible contingency, the office can be given to him. The votes cast at an election for a person who is disqualified from holding an office, are not nullities; they cannot be rejected by the inspectors, nor thrown out of the count by the return judges; the disqualified person is a person still, and every vote thrown for him is formal. Even in England, it has been held, that votes for a disqualified person are not lost or thrown away, so as to justify the presiding officers in returning as elected, another candidate having a less number of votes, and if they do so, a *quo warranto* will be granted against the person so declared to be elected, on his accepting the office. See *Cole on Quo Warranto Informations* 141-2; *Regina v. Hiorns*, 7 Ad. & Ellis 960; 3 Nev. & Perry 184; *Rex v. Bridge*, 1 M. & S.

(Majority for disqualified person.)

76. Under institutions such as ours are, there is even greater reason for holding that a minority candidate is not entitled to the office, if he who received the largest number of votes is disqualified.

We are not informed that there has been any decision, strictly judicial, upon the subject; but in our legislative bodies the question has been determined. It was determined against a minority candidate, in the legislature of Kentucky, in a case in which Mr. Clay made an elaborate report, and was sustained. In 1793, Albert Gallatin, elected a senator from this state, was declared by the senate of the United States disqualified, because he had not been a citizen of the United States nine years, and his election was declared void for that reason, but the seat was not given to his competitor; nobody supposed the minority candidate was elected. There have been several other cases of contested elections in which the successful candidates were decided to have been disqualified, and denied their offices. John Bailey's case is one of them: he was elected to congress from Massachusetts, and refused his seat, in 1824; but neither in his case, nor in any other with which we are acquainted, were the votes given to the successful candidate treated as nullities, so as to entitle one who had received a less number of votes to the office.

There is a class of cases in England, apparently, but not really, asserting otherwise. The earliest of them are referred to by Mr. Buller, in his argument in *Rex v. Monday*, Cowp. 530; they were followed by *Rex v. Hawkins*, 10 East 211, and *Rex v. Parry*, 14 East 549; in these cases it is said, that if sufficient notice is given of a candidate's disqualification, and notice that votes given for him will be thrown away, votes subsequently cast for him are lost, and another candidate may be returned as elected, if he has a majority of good votes, after those so lost are deducted. There is more reason for this in England, where the vote is *viva voce*, and the elective franchise belongs to but few, than here, where the vote is by ballot, and the

(Majority for disqualified person.)

franchise well-nigh universal. In those cases, the notice was brought home to almost every voter, and the number of electors was never greater than three hundred, and generally not more than two dozen. Besides, a man who votes for a person with knowledge that the person is incompetent to hold the office, and that his vote cannot, therefore, be effective—that it will be thrown away—may very properly be considered as intending to vote a blank, or throw away his vote. But the present relator suggests no such case. He does not even aver that, if the votes given for Cluley were thrown out, he received a majority, though doubtless such was the case. He has, therefore, exhibited no such interest as entitles him to be heard.

On the argument, we were told that in *Rex v. Godwin*, 1 Douglas 382, it was held, that the rival candidate was the most proper relator; an examination of the case, however, shows this to be a mistake. The rival candidate was the relator, but he received a majority of the votes; doubtless, in England, when the information is against a burgess or alderman of a borough, a corporator is held a fit relator; he has an interest. Our case of *Commonwealth v. Small*, 26 Penn. St. R. 31, cited in support of the suggestion, instead of being any real support, is adverse to it; the relator was, it is true, a rival candidate, but his suggestion was not supported for that reason, but because there had been a subsequent election, at which he had been elected. The court put his right to intervene expressly on the ground of that subsequent election: said Lowrie, J., “the relator shows sufficient evidence of title in himself to authorize him to institute this proceeding; he acquired it at a subsequent election, and if that is not contested on any other ground than the supposed validity of the prior election, then, of course, he is entitled to the office.” The plain inference from this is, that had it not been for the second election, he would have been an incompetent relator.

It need only be said in regard to the act of April 13th, 1840, that the relator referred to in it, is a person entitled

(Majority for disqualified person.)

to the office, if judgment be given against the party in possession.

After what has been said, it will be seen, that we are of opinion, J. Y. McLaughlin has no such interest as entitles him to be heard in a writ of *quo warranto*; the question which he seeks to raise is a public one exclusively, and it can be raised only at the instance of the attorney-general.

Writ of *quo warranto* denied.

THOMPSON, C. J., dissented.

---

The doctrine of the principal case is sustained by the decision of the supreme court of California, in *Saunders v. Haynes*, 13 Cal. 145; in that case, Baldwin, J., who delivered the opinion of the court, says: "An election is the deliberate choice of a majority or plurality of the electoral body; this is evidenced by the votes of the electors; but if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows, that the next to him in the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all, but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is next to him on the list of candidates, does not receive a plurality of votes, because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject." The same point was ruled by the supreme court of Wisconsin, in *State v. Giles*, 1 Chand. 112; and in *State v. Smith*, 14 Wis. 497. And see Opinion of the Judges, 38 Maine 597; *State v. Boal*, 46 Mo. 528; Cush. Elect. Cas. 496, 576. The election of a disqualified person, though voidable, is not *ipso facto* void. *State v. Anderson*, Coxe 318.

(Majority for disqualified person.)

On the contrary, the English decisions are unanimous that, if the electors have notice of the disqualification of a candidate, every vote given for him afterwards, will be thrown away, and considered as not having been given at all; and consequently, the candidate having the next highest number of votes will be elected. *Rex v. Monday*, Cowp. 537; *Rex v. Hawkins*, 10 East 211; *Claridge v. Evelyn*, 5 B. & Ald. 81; *Rex v. Coe*, Heywood 361; *Rex v. Blissell*, Ibid. 360; *Rex v. Parry*, 14 East 549; *Rex v. Bridge*, 1 M. & S. 76; *Regina v. Coaks*, 28 Eng. L. & Eq. 304; 7 Q. B. 406; *Cush. Lex. Parl. Am.*, §§ 175-9; 1 Wille. Corp. § 547; 2 Kyd Corp. 11-12. And this view of the law has been adopted by the supreme court of Indiana, in *Gulick v. New*, 14 Ind. 93, where the court say, that votes cast, or attempted to be cast, for an ineligible candidate, are ineffectual for every purpose; they have no more effect, in a legal point of view, than if cast for a dead person, or for one who never had a being. To the same effect is *Carson v. McPhetridge*, 15 Ind. 327; and *Stewart v. Hayes*, in the circuit court of Stephenson county, Illinois, 3 Chicago Leg. News 117. And see *Commonwealth v. Read*, ante 129. With all these conflicting authorities upon the question, it seems strange that the learned judge should have said in *Commonwealth v. Cluley*, "we are not informed that there has been any decision, strictly judicial, upon the subject." The omission to notice them certainly detracts from the authority of the case.

SPRAGINS *v.* HOUGHTON.

In the Supreme Court of Illinois.

DECEMBER TERM 1840.

(REPORTED 3 ILLINOIS 377.)

[*Proof of qualification.*]

In Illinois, if a person offering to vote take the oath prescribed by law, it is imperative upon the judges to receive his vote, unless the oath be proved to be false.

Every white male inhabitant, of the age of twenty-one years, who has resided in the state six months immediately preceding any general election, is a qualified elector; the question of citizenship does not enter into the qualification.

Appeal from the Circuit Court of Jo Daviess county. This was an action of debt *qui tam*, to recover a penalty of \$100, for the alleged misconduct of Thomas Spragins, the defendant, as judge of an election held in Jo Daviess county, in August 1838, in receiving the vote of one Jeremiah Kyle, an unnaturalized alien.

The case was submitted to the court below upon an agreed statement of facts, whereby it appeared that the defendant, as judge of an election held on the 6th August 1838, for the precinct of Galena, in the county of Jo Daviess, received the vote of one Jeremiah Kyle, an unnaturalized alien; that Kyle had resided in the state, and in the county of Jo Daviess, more than six months immediately preceding such election; and that the defendant received and counted the vote of said Kyle, knowing that he was not a citizen of the United States, or of this state, and believing him not to be a qualified voter; it was agreed, that if the court should be of opinion that Kyle was not a qualified voter, according to the constitution and laws of the state, judgment should be entered against the defendant for \$100, one-half for the use of the plaintiff and

(Proof of qualification.)

the other half for the use of the county; otherwise, judgment to be given for the defendant. The court below entered judgment for the plaintiff for \$100, which was here assigned for error.

*Douglass and McConnel*, for the appellant.

*Walker, Strong and Butterfield*, for the appellee.

SMITH, J. The points presented for examination and consideration are doubtless of deep interest, inasmuch as the judgment of the circuit court changes the rule regulating the exercise of the elective franchise, which has prevailed, ever since the adoption of the state constitution, under that constitution and the laws of the state, which have been uniform and unchanged, as to the qualification of voters, during that period, and has now, for the first time, received a new and entirely different construction, from that which has hitherto prevailed; which, if it be a just and true exposition of our constitution, and the laws regulating elections in this state, will deprive a large portion of the inhabitants of the state of the hitherto admitted invaluable exercise of the right of suffrage. The serious character of the question presented for consideration, and the magnitude of the interests involved, obviously demand of this tribunal the exercise of its most cautious, earnest and deliberate judgment, before a decision be pronounced. No considerations but those of imperative duty, founded on the solemn convictions of the weight and justice of its reasons for the foundation of its opinion, ought to prevail; and in the conclusions to which it should arrive, it should be alone animated by a desire to decide the question upon a just interpretation of the constitution and laws of the state. The effects of its decision, if just and accurate, cannot be looked to, be they what they may, as regards those who may have supposed ulterior political consequences might arise therefrom, according to the pre-

(Proof of qualification.)

dominance of the views of the one side or the other of the questions discussed. The duty of the court is as plain as it is imperative; it must decide the question, as it finds the facts arising on the record, and agreeable to the manifest intentions of the constitution and laws of the state. What might or might not be expedient, or more conformable to a supposed more proper principle of political economy, than the rule the framers of the constitution and laws of the state have thought proper to adopt, and by which the case must alone be governed, is not for the court to assume as a rule of action to govern its determination. The plain and obvious import of the constitution and laws, it is the duty of the court to ascertain; and when there is neither ambiguity nor doubt, the result can be easily arrived at.

It becomes important, then, to inquire what qualifications the constitution has prescribed a person shall possess, to entitle him to exercise the right of voting at elections in this state. The 27th section of the 2d article of the constitution declares, that "in all elections, all white male inhabitants, above the age of twenty-one years, having resided in the state six months next preceding the election, shall enjoy the right of an elector; but no person shall be entitled to vote, except in the county or district in which he shall actually reside at the time of the election." In reference to the first general election holden under the constitution, it is declared, in the 12th section of the schedule to the constitution, that "all white male inhabitants, above the age of twenty-one years, who shall be actual residents of this state, at the signing of this constitution, shall have the right to vote at the election to be held on the third Thursday and the two following days of September next." R. S. 48; Gale's Stat. 36.

It is here to be remembered, that the constitution of the state of Illinois was required, by the act of congress of the 18th April 1818, to be republican, and not repugnant to the ordinance of the 13th July 1787, between the original



(Proof of qualification.)

states and the people and states of the territory northwest of the river Ohio, excepting so much of said articles as relate to the boundaries of states therein to be formed. By the resolution of the congress of the United States of the 3d December 1818, it is expressly declared, that the constitution and state government so formed, are republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory northwest of the river Ohio, passed on the 13th July 1787; and that the state of Illinois should be admitted into the union, upon an equal footing with the original states, in all respects whatsoever.

It is of importance here to ascertain whether the ordinance of 1787 permitted resident aliens to be representatives in the territorial legislatures, and to vote at elections for representatives. By the ordinance, it is provided, that no person shall be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or, unless he shall have resided in the district three years; and in either case, shall likewise hold, in his own right, in fee simple, two hundred acres of land within the same; provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or, the like freehold, and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative. R. S. 54; Gale's Stat. 41. It will readily be perceived, that the qualification for eligibility to the office of representative in the territorial legislature, is twofold; first, three years a citizen of one of the United States, and a resident of the district, and the owner, in his own right, in fee simple, of two hundred acres of land within the district; or, secondly, three years' residence within the district, and the like ownership of two hundred acres of land, without being a citizen of one of the United States. The qualification to vote for such representative is, first, a freehold in fifty acres

(Proof of qualification.)

of land in the district, and having been a citizen of one of the states, and a resident of the district; or, secondly, a like freehold of fifty acres of land, and two years' residence in the district.

The policy of the ordinance, here disclosed, continued to be the policy of the congress of the United States, with various modifications in favor of the extension of the right of suffrage in the territories, from time to time, as its various acts of legislation disclose and distinctly recognise, and authorized aliens to enjoy the elective franchise. The emphatic term "man," it will be seen, is used, as marking the person who is to exercise the right, whether that man be a citizen or resident of the territory. The "act to enable the people of the eastern division of the territory northwest of the river Ohio, to form a state constitution and a state government, and for the admission of such state into the union, on an equal footing with the original states, and for other purposes," declared, "that all male citizens of the United States, of full age, who resided within the territory one year previous to the day of election, and who had paid a territorial or county tax; and also all persons having, in other respects, the legal qualifications to vote for representatives in the general assembly of the territory, were authorized to choose representatives to form a convention to frame a constitution and state government." This same provision, with the exception of the term of residence being reduced from one year to one day, was incorporated in the act to enable the people of Indiana territory to form a constitution and state government, and for the admission of such state into the union. The act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of the state into the union, is precisely similar, except in the reduction of the time of residence to six months. The several acts of congress erecting and regulating the territorial government, passed from time to time, not only prescribed the qualifications of voters, but

(Proof of qualification.)

gave to aliens, as well as citizens, the right of electing and being elected to office. Under the terms used in the acts to enable the people of the territories referred to, to form constitutions and state governments, it will be perceived, that "all persons having, in other respects, the legal qualifications to vote for representatives," were permitted to vote for members of the state conventions; thereby including aliens as well as citizens, who possessed the other qualifications then and there enumerated in the law.

In May 1812, the congress of the United States passed an act to extend the right of suffrage in the Illinois territory, having previously, on the 3d February 1809, by an act, established the territory of Illinois, and granted to the inhabitants the same rights, privileges and advantages as were secured to the people of the territory of the United States northwest of the river Ohio, by the ordinance of 1787; and so much of the same ordinance as related to the organization of the general assembly in said territory, was declared to be in force and operation in the Illinois territory. The act of May 1812 provides, that upon the admission of the Illinois territory into the second grade of government, each and every white male person, who shall have attained the age of twenty-one years, and who shall have paid a county or territorial tax, and who shall have resided one year in said territory, previous to any general election, and be, at the time of such election, a resident thereof, shall be entitled to vote for members of the legislative council and house of representatives for said territory. By the 3d section of the act, the right of voting for a delegate to congress, was extended to the same persons. It will be seen, that this act abolished the property qualification before required, and extended the right of suffrage to all white male persons, making no discrimination between the citizen and the resident of foreign birth. It will also be further perceived, that while the right of electing and being elected to office is conferred on persons who

(Proof of qualification.)

are neither natives nor naturalized citizens of the United States, these same persons were permitted to become members of the conventions which framed the constitutions of Ohio, Indiana, Michigan and Illinois; and it is notorious, that those constitutions were adopted by a portion of votes given by persons who were not citizens of the United States. Under this undeniable policy, and after it had been practised on, in the Illinois territory, for a period of more than six years, the constitution of Illinois was formed, and the provision relative to the elective franchise adopted.

It is conceived, that misapprehension prevails, to a considerable extent, as to the right of a state to admit other persons than citizens, native or naturalized, to vote at elections. Each state has the undoubted right to prescribe the qualifications of its own voters. And it is equally clear, that the act of naturalization does not confer on the individual naturalized, the right to exercise the elective franchise; while other civil rights are conferred by it, that of voting at elections for officers of the state, is not one, unless the party possess the other requisite qualifications defined by the state law, where citizenship is one of the necessary requisites to its exercise. The first paragraph of the second section of the first article of the constitution of the United States declares, that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. This is alone applicable to the choice of members of the house of representatives of the United States, and is regulated, of course, by the qualifications prescribed by the state laws, for the qualification of its voters in the choice of its representatives in its own legislature. The qualification which the voter is required to possess in a congressional election, depends entirely on the laws of the state in which the elective franchise is exercised, and is purely dependent on the municipal laws of the state. The constitution of the United States, in this particular, is

(Proof of qualification.)

wholly subordinate to the legislative will of the state; whatever it prescribes, is adopted, as the qualification of the voter for members of congress. In speaking of this provision of the constitution, the 51st number of the *Federalist*, written by Mr. Madison, contains the following just comments: "To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option; it must be satisfactory to every state, because it is conformable to the standard already established, or which may be established, by the state itself; it will be safe to the United States, because, being fixed by the state constitutions, it is not alterable by the state governments; and it cannot be feared, that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution." Each state of the union has not only exercised this power, at discretion, ever since the first organization of the government of the United States under its own constitution, original, modified or changed in any manner whatsoever, but the qualifications of electors are variant and dissimilar in many of the states; some differing in the period of residence; others making the possession of real estate essential; and others permitting, on certain conditions, free negroes to enjoy the right of suffrage. Hence, in all of the states, there may be frequently individuals who cannot exercise the right of suffrage, though native citizens, because of the want of the possession of the requisite legal qualifications.

The question, what is the true reasonable interpretation of the 27th section of the 2d article of the state constitution, defining the qualifications of an elector, is now to be considered, under the antecedent practice which, it is seen, prevailed under the provisions of the ordinance and acts

(Proof of qualification.)

of congress. To arrive at a just solution of this inquiry, it is important to ascertain, with exactitude, the true definition and meaning of the term "inhabitant," as used in the section of the constitution under consideration. The term "inhabitant" is derived from the Latin, *habito*, and signifies, to live in, to dwell in; and is applied, exclusively, to one who lives in a place, and has there a fixed and legal settlement. It embraces locality of existence; it refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence; and as used in the section referred to, the place where the elector dwells, at the time of his voting. The term is conceived to be entirely free from technicality, and has a known and universally-accepted meaning, all agreeing in considering inhabitant as directly connected with habitation and abode. It is supposed, that a term of no technicality, so simple and expressive in itself, and so clear and definite in its character, is susceptible of but one meaning. This residence, however, is to be *bonâ fide*, and not casual or temporary. To determine, then, the qualifications of an elector in this state, it would seem to be wholly unnecessary, to inquire whether the elector was a citizen of the United States; possessing the qualifications declared in the constitution, and recapitulated in the law of elections, he should be deemed a qualified voter, and admitted to vote, though not a citizen of the United States.

It is, however, strenuously contended, that the term "inhabitant" is synonymous with "citizen," and should receive the same interpretation. To test this argument, let us consider, in what sense the framers of the constitution must have used the term, as applicable to the object they had in view, at the time of its use, independently of its ordinary signification. We have already seen, that it was the policy of the United States government, to confer on the inhabitants of the territory, without reference to their citizenship, the right of electing and being elected to office; this peculiar policy, adopted by the ordinance,

(Proof of qualification.)

continued the settled rule of action, and was marked by its continuance, in all the acts of congress in reference to the territories; and peculiarly so in reference to Illinois, (as is shown by the act to extend the right of suffrage therein), up to the adoption of the state constitution. It is a matter of history, that a large portion of the inhabitants of Illinois, antecedently to, and at the adoption of the state constitution, were French and Canadian immigrants; many had come to Illinois, before the capture of the French settlements, during the revolutionary war, by George Rogers Clark; while others arrived during the war, and some after peace had been proclaimed. The articles of compact contained in the ordinance, embraced a stipulation in favor of the then inhabitants, which declared, "that the inhabitants of said territory shall always be entitled to the benefit of a proportionate representation of the people in the legislature;" and they were also declared "subject to pay a part of the federal debt, and a proportionate part of the expenses of government, to be apportioned on them by congress, according to the same common rule and measure, by which apportionments should be made on the other states." One of the many reasons for the introduction of the policy of permitting aliens to vote and be voted for, as declared in the ordinance and the legislation of congress, is to be found in the aforesaid stipulations; and sufficiently explains, in connection with others to be hereafter adverted to, the causes of its adoption and continuance.

Pursuing the same spirit of justice and liberality, the framers of the state constitution intended to carry out a continuance of the policy of admitting to vote, not only those who were inhabitants of the territory at the time of the adoption of the constitution, but also all those who might subsequently become inhabitants of the state, and should become otherwise qualified to exercise the right of suffrage there, as citizens of the United States. It was but in accordance with the policy which had antecedently

(Proof of qualification.)

prevailed; and was further supported, as is well known to those who heard the discussions in the convention, by the supposition, that the exercise of this political right, with the further one, to be enacted by the legislative department, of holding, conveying and devising real estate, would induce a flood of immigration to the state, and cause its early and compact settlement. That such was its influence on the convention, is believed to be beyond doubt; though its effects and influences may have failed in the extent of its anticipated operation.

That this is the just and reasonable interpretation of the 27th section, may be further established, by a recurrence to the congressional debates which occurred on the discussion relative to the admission of the state of Michigan into the union. On the 29th of March 1836, a debate arose in the senate of the United States, on the bill to establish the northern boundary-line of Ohio, and for the admission of Michigan into the union. On that occasion, in adverting to the clause in the constitution of Michigan, defining her boundaries, which conflicted with those of Ohio, exception was taken to the second article of the constitution of Michigan; the article is as follows: "In all elections, every white male citizen, above the age of 21 years, having resided in the state six months next preceding any election, shall be entitled to vote at such election; and every white male inhabitant, of the age aforesaid, who may be a resident of this state, at the time of the signing of this constitution, shall have the right of voting as aforesaid; but no such citizen or inhabitant shall be entitled to vote, except in the district, county or township in which he shall actually reside at the time of such election."

Senator Buchanan, in that debate, remarked, "It had been said, that Michigan ought not to be admitted under her present constitution, because, by it, every white male inhabitant in the state had the right of voting, contending that this provision gave the right of suffrage to



(Proof of qualification.)

others than citizens of the United States. He asked gentlemen to mark the distinction here drawn by the gentleman from Delaware, and to judge whether this objection was well founded; Michigan confined herself to such residents and inhabitants as were there at the signing of her constitution; and to those alone she extended the right of suffrage. Now, we have admitted Ohio and Illinois into this union, two states of whom we ought certainly to be very proud. He would refer senators to the provision in the constitution of Ohio on that subject; by it, all white male inhabitants, twenty-one years of age and upwards, having resided one year in the state, are entitled to vote. Michigan had made the proper distinction; she had very properly confined the elective franchise to inhabitants within the state at the time of the adoption of the constitution; but Ohio had given the right of suffrage, as to all future time, to all her white inhabitants, over the age of 21 years; a case embracing all time to come, and not limited as in the constitution of Michigan. He had understood, that Ohio, since the adoption of her constitution, had repealed this provision by law; he did not know whether this was so, or not, but here it was, as plain as the English language could make it, that all white male inhabitants of Ohio, above the age of 21 years, were entitled to a vote at her elections. Well, what has Illinois done in this matter? He would read an extract from her constitution, by which it would appear, that only six months' previous residence was required, to acquire the right of suffrage; the constitution of Illinois was, therefore, still broader and more liberal than that of Ohio; there, in all elections, all white male inhabitants, above the age of 21 years, having resided in the state six months previous to the election, shall enjoy the right of suffrage. Now, sir, it has been made a matter of preference by settlers, to go to Illinois, instead of other new states, where they must become citizens before they can vote; and he appealed to the senators from Illinois (who admitted such was the

(Proof of qualification.)

fact), whether this was not now the case; and whether any man could not now vote in that state, after six months' residence. Now, here were two constitutions of states, the senator from one of which was most strenuously opposed to the admission of Michigan, which had not extended the right of suffrage as far as was done by either of them. Did Michigan do right in thus fixing the elective franchise? He contended that she did act right, and if she had not so acted, she would not have acted in obedience to the spirit, if to the very letter, of the ordinance of 1787. Michigan took the right ground, while the states of Ohio and Illinois went too far, in making perpetual, in their constitutions, what was contained in the ordinance. When congress admitted Ohio and Indiana on this principle, he thought it very ungracious in any of their senators or representatives, to declare that Michigan should not be admitted, because she had extended the right of suffrage to the few persons within her limits at the adoption of her constitution." Senator Ewing, of Ohio, urged, that the precedents referred to by the senator from Pennsylvania, were admitted under troublesome circumstances, but ought not to be followed. 2 Cong. Deb. 1014-15.

On the 9th of June following, in a debate which arose in the house of representatives of the United States, on the same bill for the admission of the state of Michigan into the union, Mr. Everett, among other grounds assumed by him, as causes of objection to her admission, stated those which related to her constitution: 1. "It was formed by a convention elected in part by foreigners:" 2. "It naturalizes foreigners." In the analysis which he made, on the occasion referred to, of the various provisions of the ordinance of 1787, and examined on this occasion, it will be seen, from his argument, that he conceded, the ordinance of 1787 admitted foreigners to vote, under the territorial government, and that "the privilege of extending to foreigners the right of voting for representatives of the terri-

(Proof of qualification.)

torial legislature, has been extended to the election of delegates of the conventions for forming state constitutions." He remarked, "that in the act of 1802, for the formation of the constitution of Ohio, the persons entitled to vote were, all male citizens of the United States, of full age, resident within the territory for one year, having paid a territorial or county tax; and all persons having, in other respects, the legal qualifications to vote for representatives in the general assembly of the territory." "The latter clause," he said, "must refer to the provisions of the ordinance of 1787, before stated." He said, the acts of the 3d March 1811, and 20th May 1812, extended the right of suffrage, in Indiana and Illinois, to every free white male person, of the age of twenty-one years, who shall have paid a county or territorial tax, and resided one year in the territory. "The acts of 19th April 1816, and 18th April 1818, authorizing the election of conventions to form constitutions in those states, authorize every free white male citizen of the United States, and all other persons having, in other respects, the legal qualifications to vote for representatives, to vote for delegates of the convention; thus," he declared, "aliens have been permitted to vote for delegates to the conventions for forming the constitutions of Ohio, Indiana and Illinois; but would congress, in the case of Michigan, allow aliens to vote?"

Mr. Everett then proceeded to show, that the case of Michigan was different from Ohio, Indiana and Illinois, because, although the act of 1808, establishing the territory of Michigan, secured to the inhabitants the same rights of voting that were granted by the ordinance of 1787, yet, the act of 16th February 1819, authorizing the territory to send a delegate to congress, conferred the right of suffrage on only free white male citizens of the territory, who had resided one year therein next preceding the election, and had paid a county or territorial tax; and that, in addition thereto, the act of 3d March 1823, virtually repealed all prior acts relating to the rights of suffrage,

(Proof of qualification.)

providing "that all citizens of the United States, having the qualifications prescribed by the act of 16th February 1819, shall be entitled to vote at any public election in said territory, and shall be eligible to any office therein;" thereby taking away all rights, by such repeal, existing under those laws. He then says, "thus, at the time of the calling of the convention for the formation of the constitution of Michigan, it was the fundamental law of the territory, that none but citizens of the United States, who had resided in the territory one year next preceding the election, and had paid a county or territorial tax, should be entitled to vote." He then proceeds to say, "that there were several reasons for this law, as applied to Michigan, which did not apply to either of those three states; the territory of Michigan, on its whole settled frontier, was contiguous to a foreign thickly-settled country, whereas that was not the case with either of the other states; and it was necessary to change the law, so as to prevent such foreign population, easily transported across the line, from voting at our elections. Yet, in the face of the law of the land, the territorial legislature had authorized foreigners to vote, and those who had resided in the territory only twenty-two days previously to the passage of the act; the act was passed on the 26th day of January 1835; in the 2d section the qualification of voters is prescribed: 'That the free white male inhabitants of the said territory, above the age of twenty-one years, who shall reside therein three months immediately preceding Saturday, the 4th day of April next, in the year 1835, be and they are hereby authorized to choose delegates to form a convention, who shall be elected in the several districts, as follows.' Would congress have passed an act of this description? If not, will they sanction it? The act is a fraud on the rights of the citizens of the United States in that territory. The constitution, then, is the result of foreign votes, and accounts for that objectionable clause in it, which naturalizes those foreigners who thus secured the victory." The con-

(Proof of qualification.)

stitution was signed on the 24th June 1835, and contains the second article, already quoted, and upon which, Mr. Everett remarked, "thus, every foreigner, of the age of twenty-one, who resided in the territory on the 24th day of December, is naturalized by this article of the constitution, and clothed, in express terms, with the highest political privilege of a citizen of the United States. Under a constitution thus formed, and containing this unconstitutional article, I cannot consent to admit Michigan into the union."

Mr. Russell, Mr. Hamer and other members, during the debate, assumed similar grounds, and gave similar reasons for their opposition to the admission of Michigan into the union. From these debates, which will be found in 12 Cong. Deb., parts 1 and 4, it will be perceived, that there was no difference of opinion as to the effect of the term "white male inhabitants;" all agreed, those for, as well as those opposed to, the admission of Michigan, that those terms conferred the right of voting on unnaturalized inhabitants, provided they possessed the other requisite qualifications. The reasons and arguments of the able and talented individuals who participated in the debates on that occasion, are not referred to, by any means, as conclusive authority on the question now under consideration, but as high evidence of the correctness of the expositions which were then given, on a question which is, as to the accurate and practical definition of the terms used, directly in point and precisely parallel. The extent of the political rights acquired by the terms used, was not doubted, nor was their application questioned. Throughout the debate, the point was conceded; but the policy of incorporating the right was reprobated and condemned by those who opposed her admission into the union.

To show, however, that the position assumed, which asserts the terms "inhabitant" and "citizen" to be synonymous and correlative, is not sustainable, even in a political sense, the following extract is transcribed from

(Proof of qualification.)

the report of the Committee on Elections in the congress of the United States, in the case of John Bailey, which transpired in 1824; this report was approved by congress, and Mr. Bailey ejected from his seat by a large majority of the house, without distinction of party. On inquiry into the meaning of the word "inhabitant," as used in the constitution of the United States, in reference to the qualification of a representative in the congress of the United States, the committee remark: "having examined the case in connection with the probable reasons which influenced the minds of the members of the convention, it may not be improper, before an attempt is made at a further definition of the word, a little to consider that of 'citizen,' with the view of showing that many of the misconceptions in respect to the former, have arisen from confounding it with the latter. The word 'inhabitant,' comprehends a single fact, locality of existence; that of 'citizen,' a combination of civil privileges, some of which may be enjoyed in any state of the union; the word 'citizen' may properly be construed, a member of a political society; and although he might be abroad for years, and cease to be an *inhabitant* of its territory, the right of *citizenship* may not thereby be forfeited, but may be resumed whenever he may choose to return."

From what has already been said, it must appear, that the words "citizen," and "inhabitant," cannot be considered synonymous. In the 3d section of the 2d article of the state constitution, the words "inhabitant" and "citizen" are used in juxtaposition; the representative is to be not only a citizen of the United States, but an inhabitant also of the state. Another authority may be found in Vattel, supporting very clearly this distinction; in book I., ch. 19, § 213, he says, "the inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country; bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are bound to

(Proof of qualification.)

defend it, while it grants them protection, though they do not participate in all the rights of citizens." This authority shows very plainly the distinction between the citizen and the inhabitant; and that the latter appellation is derived from abode and habitation, and not from political privileges.

In further support of this principle of distinction, reference may be had to the act of congress of the 1st March 1790, entitled "an act providing for the enumeration of the inhabitants of the United States;" this act provides, "that the marshals of the several districts of the United States shall be, and they are hereby authorized to cause the number of inhabitants within their respective districts to be taken;" it further provides, "that a perfect enumeration and description of all persons resident in the district, shall be made;" thus showing, in the opinion of congress, that the persons residing in or living in the respective districts, were the inhabitants thereof. This is also the sense in which the term "inhabitant" is used in the state constitution. Whenever the qualifications of eligibility for office are defined, it uses the term "citizen of the United States," as contradistinguished from inhabitant; so, on the contrary, when the qualifications of a voter or elector are named, it uses the word "inhabitant," and has no reference to that of citizen. Nor are the terms, in that instrument, confounded or used indiscriminately, as equivalent phrases; thus, art. II., § 27, "all white male inhabitants shall enjoy the right of an elector;" not all white male citizens who are inhabitants; so, in § 12 of the schedule, it conferred the right of voting at the first election held under the constitution, on all white male inhabitants, actual residents of the state at the time of signing the constitution; showing most distinctly, that citizenship of the United States was, by no means, regarded as one of the qualifications of an elector. It embraced all who were, at the time, actual residents of the state, without regarding how long they had been residents; it was enough, if

(Proof of qualification.)

they were so at the time specified. Again, the constitution uses the word "inhabitant," when referring to the masses of population, including all; thus, senators and representatives are to be apportioned according to the number of white inhabitants. Art. II., § 5. "An enumeration of all white male inhabitants shall be made." Art. II., § 31. All lands which have been granted as a common to the inhabitants, &c. The general assembly shall have power and authority to grant the same privileges to the inhabitants of the said villages of Cahokia and Prairie du Pont, as are granted to the inhabitants of other towns. Art. VIII., § 8.

So, in the state legislature, the terms, and the distinction between, citizen and inhabitant have ever been understood and used. Thus, the act for taking the census provides for making an enumeration of the inhabitants of the state. R. S. 114; Gale's Stat. 135. The act of 1827, relative to grand and petit jurors, has these peculiar expressions: "that all free white male taxable inhabitants in any county of this state, being natural-born citizens of the United States, or naturalized according to the constitution and laws of the United States and of this state, between the ages of 21 and 60 years (with certain enumerated exceptions), shall be considered and deemed as competent persons to serve on grand and petit juries." R. S. 378; Gale's Stat. 395. In this provision, the exception therein contained of citizenship, clearly indicates that an inhabitant is not necessarily a citizen; on the contrary, it asserts the obvious distinction, and that the term does not by any means imply citizenship. It would be almost a waste of labor to attempt to prove the contrary; hence, it would be no more than rational, to suppose that distinction to be well understood and settled.

If any doubt could be supposed to remain, in reference to the true interpretation of the meaning of the constitution on this question, it is supposed such doubt will be dissipated on recurring to the provision of the election



(Proof of qualification.)

law, passed by the first legislature held under the constitution, by which the judges of the election are to test the elector's right of suffrage. This act was approved and in force on the 1st March 1819; the 14th section is as follows: "And be it further enacted, that whenever any person shall present himself to give his vote, and either of the judges shall suspect that such person does not possess the qualifications of an elector, or, if his vote shall be challenged by any elector who has previously given in his vote at such election, the judges of the election shall tender to such person an oath or affirmation, in the following form: 'I, A. B., do solemnly swear, that I have resided in this state for the period of six months immediately preceding this election; that I have, to the best of my knowledge, attained the age of twenty-one years; and that I have not voted at this election;' and if the person so offering his vote, shall take such oath or affirmation, his vote shall be received, unless it shall be proved, by evidence satisfactory to all the judges, that the said oath or affirmation is false; but if such person refuses to take such oath or affirmation, his vote shall be rejected." The residue of the section declares, that taking a false oath, in order to vote, shall be deemed perjury and punished as such. This act was the first exposition, given by the first legislature which sat after the organization of the state government; it is its solemn and deliberate interpretation of the constitution, on the qualifications necessary to be possessed by the person claiming the right of an elector, and should be held to be conclusive of its real meaning; it is couched in the almost literal language of the constitution, and is, as such, its best exponent.

What are the facts the person offering to vote is required to depose? 1. That he is a resident of a particular township: 2. That he has resided in the state six months immediately preceding the election: 3. That he has, to the best of his knowledge and belief, attained the age of twenty-one years; and that he has not voted at the election at

(Proof of qualification.)

which he then offers to vote. The term "resident," to which he is required to swear, may be considered less restricted in its sense and meaning than "inhabitant," for which it seems to have been used as equivalent; it is, certainly, not to be considered more comprehensive, and implying other qualifications than those enumerated. If the term "inhabitant" had been used, instead of "resident," it would not have implied more than is implied by the term "resident," though the literal language of the constitution. Indeed, if any inference is to be drawn from the use of the term "resident," it is certainly fair to presume, that, by its use, the members of the legislature intended to declare that the term "inhabitant" did not imply "citizen," but one who was a resident of the state; and is an explicit interpretation that the term "inhabitant" meant, absolutely, one who dwells in the country. What is a resident, but an inhabitant? and is it not directly contradistinguishable from a citizen, who may not be an inhabitant?

There is one remarkable fact connected with the history of the adoption of the election law by the first legislature, and that is, that one-third of the persons who were members of the state convention which framed the constitution, were members of that general assembly; hence, the inference is irresistible, that the interpretation they have put on the 27th section of the 2d article of the state constitution, which defines the qualifications of an elector, by the election law of 1819, is the only true exposition of that article. In 1821, the act of 1819 was revised, and the only change made in the oath required to be taken by electors, was the substitution of the word "county" for "township." In the years 1823, 1825 and 1833, this act again underwent revision; but no change was made in this section, except the addition, after the words "county of," of the words "in the state of Illinois;" thus leaving the provisions of the section, to this day, as they stood, as to the qualifications of electors, at its adoption. It has, therefore, been the fixed and unchanged legislative inter-

(Proof of qualification.)

pretation of the constitution, for a period of more than twenty years, universal in its operation, and undisputed up to the present time.

This contemporaneous legislative exposition, which was coeval with the state government, has assuredly settled the question. It is conceived to be no longer a debatable one, and ought not now to be disturbed; the practice under it, and the universal acquiescence of all departments of the government, and of the people, in it, ever since the creation of that government, ought to be understood as a positive affirmance of its correctness. It is a contemporaneous exposition of the most forcible nature, and too obstinate and strong to be now shaken, by objections which are of very recent origin. Not only have the legislative and executive departments, on all occasions when the law was presented for their action, sustained it, but the council of revision, composed, in part, of all the members of this court, with whom is lodged the veto power, have given to it, its repeated and united sanctions; as well those who composed the judicial department, and who were chosen under the constitution, immediately after its adoption, as those who have subsequently succeeded them, and have been members of this council.

From an examination of the journal of the convention, the 27th section seems not to have undergone any revision; it stands in the constitution as it did in the original draft. But the 11th section of the 3d article, which provides for the election of sheriffs and coroners, presents one fact, deemed material in the consideration of the present question; one, it is thought, affording much light on the meaning of the term "inhabitant," as used by the members of the convention, and as they then understood it. On the 12th August 1818, Mr. White, chairman of the committee appointed to frame and report to the convention a constitution for the people of the territory, reported a draft of a constitution; the 11th section of the 3d article of this draft contained the following provision: "there

(Proof of qualification.)

shall be elected in each and every county in the said state, one sheriff and one coroner, by the citizens who are qualified to vote for members of assembly, and shall be elected at the places where elections for members of the general assembly are held, and shall be subject to such rules and regulations in said elections as shall be prescribed by law; the said sheriffs, respectively, when elected, shall continue in office two years, be subject to removal or disqualification, and such other rules and regulations as may, from time to time, be prescribed by law; no sheriff shall be eligible for said office for a longer term than four years, in any term of six years." This section, it will be perceived, was materially amended in the convention, in many respects, for its final adoption; and the word "citizen" stricken out, and the word "those" adopted in its stead; thus, making the provision, as it now stands in the constitution, in this particular, to read: "there shall be elected by those who are qualified to vote for members of the general assembly, and at the same times and places where the election for such members shall be held, one sheriff and one coroner, whose election shall be subject to such rules and regulations as shall be prescribed by law."

The convention seems to have studiously avoided the use of the word "citizen," wherever the qualification for voting was in question; and in no instance, have they adopted it as a correlative term with "inhabitant," except in the 23d section of the 5th article, where it is declared, that "every citizen may freely write and print on every subject, being responsible for the abuse of that liberty;" and in the 1st section of the 7th article, providing for the holding of a convention to amend the state constitution, wherein it declares, "and if it shall appear that a majority of the citizens of the state, voting for representatives, have voted for a convention, the general assembly, at its next session, shall call a convention." Now, a person may be, in the ordinary sense of the term, a citizen of this state, but still, not a citizen of the United States.

(Proof of qualification.)

The term here used, is not conceived to be, in any other sense than that of an inhabitant; because if such had been the sense of the convention, it would, doubtless, have used the term "citizen" instead of "inhabitant," in the article defining the right of suffrage.

The consequence of insisting that additional qualifications of citizenship should be required, would be most onerous in its operation on a numerous portion of the French inhabitants, who came to the country since 1787, as we have already shown, and who have reposed, in good faith, under the hitherto admitted and undisputed recognition of their political rights. There are many of them neither citizens by birth nor adoption; and to now interpose a regulation that would disfranchise them, would be most unjust; to say that they shall not now enjoy, under the constitution which they, in part, assisted to form and ratify, rights which they have exercised ever since its formation, would be most dangerous, for its unexampled character of bad faith, and for its innovation on rights hitherto conceded without question. It will not even do to say, that they may be admitted to exercise the right of suffrage, though aliens, and that they are not the aliens intended to be excepted, in the construction proposed to be given to the constitution, by those who insist that, under the term "inhabitant," none but citizens of the United States are meant. The exclusion must, of necessity, reach them, if it reaches others, because they are not citizens of the United States, and were not included in the ordinance as the persons whose rights were saved thereby. If, under the general provision which conferred on them the elective franchise, natives of other countries, who are inhabitants of the state, are entitled to similar privileges, which, it is supposed, ought not to have been, as a matter of sound policy, bestowed on them, it is no sufficient reason, because those rights have been thus incidentally extended, that the early immigrants should, for

(Proof of qualification.)

such cause, suffer a deprivation of those which they are, of right, entitled to.

It is, however, apprehended, that the authors of the constitution, for the reasons already stated, intended to extend the right of suffrage to those who, having by habitation and residence, identified their interests and feelings with the citizen, are, upon the just principles between the governed and governing, entitled to a voice in the choice of the officers of the government, although they may be neither native nor adopted citizens. If the right of suffrage be a natural, and not a conventional one, there can be no just cause for abridging it, unless by way of punishment for crime, and under very peculiar circumstances, and for peculiar causes. The convention had, doubtless, a desire to make the recognition of the right stand on as extensive grounds as were compatible with the perpetuity of the compact they originated, the good order of society, and the protection of the rights declared; in this spirit of interpretation, it is supposed, the views of its members will be best supported and maintained. The sentiments here expressed seem to have been entertained by the convention, and expressed in the concise but comprehensive declaration, contained in the 5th section of the 8th article of the constitution, which says, "that all elections shall be free and equal."\*

There is, however, another view in which this question is to be considered. The provision regulating the mode of challenge to the elector's right to vote, declares that, if the oath or affirmation prescribed shall be taken, the elector's vote shall be received, "unless it shall be proved, by evidence satisfactory to a majority of the judges, that said oath or affirmation is false." The judges, then, where the oath is taken or affirmation is made, and such oath or

\* The supreme court of Pennsylvania have actually decided (by a bare majority only), that these words do not restrain the legislature from imposing restrictions upon the right of suffrage, in one part of the state, which are not obligatory in other portions of it!

(Proof of qualification.)

affirmation is not proved, by evidence satisfactory to a majority of them, to be false, have no discretion; they are bound to receive the vote, and moreover, by another provision of the election law, are subject to a severe penalty in case of refusal. Whether the elector be a native or adopted citizen, or an unnaturalized foreigner, they have no right, nor are they bound, by any necessity in the discharge of their duty, to inquire. They are vested with no discretion in the matter; if the elector possess the qualifications required by law, which, we have seen, are few and simple, all extraneous inquiries are irrelevant to the performance of their duty. They can no more add to, than they can diminish, the law, by their opinion of what it ought to be; nor can any interpretation be put on it by them, to disfranchise those whom the law clearly embraces within its provisions. The law is so plain and simple, that it carries on its face, its own obvious meaning, and is not susceptible of doubt or ambiguity; the oath has been made the test of the right to exercise the franchise, and contains within itself the standard by which that right is to be determined. Unless the legislature shall make citizenship an indispensable qualification to the enjoyment of the elective franchise (and the constitution clearly admits of the exercise of such power by that body), this tribunal cannot add such a prerequisite, by construction.

In reference to the construction which may have been given, in other states, by legislative enactments, to the meaning of the term "inhabitant," and that it is to be considered "citizen," I cannot, even admitting it may have been there correctly decided, on such occasions, see any reason for the adoption of such a construction on the present occasion. In the first place, it seems to me, to be a perversion of the use and meaning of language, as universally understood, and an imputation on the authors of its use, in the cases referred to, of a want of knowledge of the appropriate meaning of terms. It is clear, that a

(Proof of qualification.)

person may be a citizen of the United States, when he is an inhabitant of a foreign state. But the adoption of such a rule as has been resorted to in other states, by which a term, admitting, it would seem, of no doubt of its true sense, has been made to imply the very reverse of its universal acceptance, is eminently forbidden here. It cannot, in my judgment, be just, because of the facts which existed, at the time of its use in the ordinance of 1787. The evident sense in which it is employed in that ordinance, and the subsequent facts which followed, and have uniformly accompanied its employment, from its incorporation in the territorial laws of the Northwestern territory, the acts of congress for the admission of those territories and their reception into the union, and the steady and uniform rule adopted by every department of the government of this state, without a single exception, up to the present hour, should be conclusive of its meaning.

It is well understood, that it was the policy of the congress of the United States, at the formation of the ordinance of 1787, to invite immigration into the Northwestern territory; and hence, as one strong inducement for immigration, the right of suffrage was extended to aliens in those territories, as they should be successively formed out of the Northwestern territory proper. Whatever may have been the causes and motives which induced New York or Massachusetts, or any other state, to give the legislative interpretation, which has been done, to the clauses of their constitutions which regulate the right of suffrage in those states, the facts and circumstances which existed in reference to the states formed out of the Northwestern territory, did not, in any way, occur there; consequently, their decisions form no guide, admitting they were correct, on the present occasion.

But it may be said, Ohio is one of the states formed out of that territory, and she has adopted the exposition, and construed the term "inhabitant" to mean "citizen."



(Proof of qualification.)

Under what particular causes, the legislative construction adopted by her legislature in 1831, was brought about, the means of determining are not at hand; nor can it be averred, with certainty, what was her practice anterior to the passage of that act. In the very first act adopted by her legislature, after the formation of her constitution, it is certain, that no prohibition to the reception of aliens' votes existed, nor up to the passage of the act of 1831. That act was passed on the 15th April 1803; the 13th section provided, that the elector should openly, and in full view, present his ballot to the judges of the election, on which should be written or printed the name of the person and office voted for; and it confined the elector to the township in which he resided. The 14th section is in these words: "that the judge to whom the ticket shall be delivered, shall, upon the receipt thereof, pronounce with an audible voice, the name of the elector; and if no objection be made to him, and the judges be satisfied that the elector is legally entitled to vote at that election, he shall immediately put the ticket into the box, without inspecting the name or names written thereon." The 15th section declares, "that when objections are made to an elector, and in all other cases where the qualification of a person to vote is a fact unknown to either of the judges, they shall have power to examine such person, on oath or affirmation, touching his qualifications as an elector, which oath or affirmation either of the judges is hereby authorized to administer." Laws of Ohio, 1803. In 1809, an act was passed on the 15th February, amendatory of the act of 1803, by which the 15th section referred to and quoted, was amended, by the addition of the following, after the words "touching his qualifications as an elector," "or they may inquire into the qualification of such elector, on the oath or affirmation of disinterested witnesses, which oaths or affirmations either of the judges is hereby authorized to administer."

From these general provisions, the judges of the election

(Proof of qualification.)

were constituted the sole judges of the qualifications possessed by the elector presenting himself to vote under the provision of the state constitution, which, except as to the time of residence and payment of a tax, is similar to our own. What was the early practice, under the constitution and laws of Ohio, no distinct means of knowing are at hand. It has been distinctly affirmed, that the early practice was, to admit aliens, as had been the rule while under a territorial government, and such would seem to have been the intention of the legislature, by the passage of the acts of 1803 and 1809. They gave no legislative construction to the first section of the 4th article of their state constitution, probably conceiving it so explicit, that no one could be mistaken in the meaning of the term "inhabitant." It has, however, been affirmed, in a debate which occurred in the United States senate, in 1836, on the question of the admission of Michigan into the union, before referred to, that such was the practice in Ohio, and as distinctly admitted in that debate by senator Ewing of Ohio, who said, "that was done in troublesome times."

On the 13th February 1831, we find the legislature of that state passed an act, by which they gave not only, it is conceived, a legislative exposition to the first section of the 4th article of the constitution of that state, denying the right and changing the practice, but absolutely adding the additional qualification of citizenship, to authorize the elector to vote. The 10th section of that act is as follows: "that the judge to whom any ticket shall be delivered, shall, on the receipt thereof, pronounce with an audible voice the name of the elector; and if no objection be made to him, and the judges be satisfied that the elector is a citizen of the United States, and legally entitled, agreeable to the constitution and laws of the state, to vote at the election, he shall immediately put the ticket in the box, without inspecting the names written thereon, and the clerk shall enter the names," &c. Here it will be perceived, that the elector is required to be a citizen of the

(Proof of qualification.)

United States, in addition to being legally entitled, agreeable to the constitution and laws of the state, to vote, before he can be admitted to vote in that state. Now, was it not enough, under the constitution, that he was "a white male inhabitant of the state, had resided one year next preceding the election therein, and had paid or been charged with a state or county tax," to entitle him to vote? The constitution required no more; but the legislature require what the constitution does not; they superadd the requisition of citizenship, attempt to extend the constitution, and impose a condition beyond the constitution itself. They do not say the terms "white male inhabitant," shall be construed to mean "citizen," but that the party shall possess this political character, before he shall enjoy the right of suffrage.

I have not the means of knowing, under what particular circumstances, twenty-eight years after the adoption of the constitution, and the passage of the first law relative to the elective franchise, it became necessary to make this radical change in the law, evidently an attempt to change rights guarantied by the constitution of the state; but if history is to be consulted, the same debate which occurred in the senate of the United States, would seem to furnish the clue. Senator Benton, after remarking on the duty of congress to guaranty the republican character of a state constitution, added "and for that purpose had cognisance over the state constitutions, and for nothing else;" anything further was an invasion of the rights of the states, and congress had no right to meddle with the qualifications of voters in any of the states, old or new. This brought him to the objection, that the voting privilege was extended to the inhabitants of the territory, at the time of the adoption of the constitution, and not confined to those who were citizens of the United States; he left this question where it had been placed by others, as an affair that belonged to the state, and which every state had decided for herself, and many of them, so as to give aliens the right

(Proof of qualification.)

of voting, and even holding office; he referred to Illinois, Louisiana and even Ohio, and asked, was it not matter of history, that, within a few years past, the legislature of Ohio had decided that the word "inhabitant" meant "citizen?" and they defined it so, because a gentleman, who was a subject of the King of Great Britain, was presiding over their deliberations, and might act as their lieutenant-governor.

It seems, that in 1814, an action was brought in Ohio, in the county of Jefferson, against three persons, as judges of an election in that state, who had refused to receive the vote of a person named Johnston, on the ground that he was not a citizen of the United States, but an alien and a native of Great Britain, and had not been naturalized agreeable to the laws of the United States, and was not, according to the laws of Ohio, entitled to vote at such election; and on the further ground, that Great Britain and the United States were then at war. The question having been decided on a demurrer to the pleas of justification, which contained the causes above stated, as the grounds of defence, the supreme court of that state, in 1817, decided the pleas to be a bar to the action, and rendered judgment accordingly in favor of the defendants. The case has never been reported, and it is well understood that there is no written opinion remaining on file in that court, which discloses the reasons on which the judgment was predicated; whether on the ground of the plaintiff's being an alien enemy, or an unnaturalized citizen, or whether he was excluded by the qualifications of the election laws of that state, then in force. The pleadings in the cause show that the defendants rested their defence of justification, in their refusal to receive the vote, on the law of the state then in force, and not on the provisions of the constitution of the state; no question appears, from the record, to have been raised, whether the laws prescribing the qualifications were in conflict with the constitution, and we are wholly unable to determine what may have

(Proof of qualification.)

been the reasons and the grounds on which the court decided. The rule, however, in that case, would not be a safe one to follow; nor can it, under the circumstances, be considered of any authority. Under all the facts and views already stated, it would be inapplicable to our condition; and its operation would be in conflict with the principles we have already stated, which time and practice have justly consecrated.

There has been an argument advanced, which it is here proper to notice; it is said, that in case of war, a resident-native of the belligerent country with which we may be waging hostilities, in the act of voting, might be restrained in the exercise of his right as an elector, by virtue of an order of the president of the United States to the marshal of the district, under the act of congress concerning aliens in time of war, to remove such person to some remote point. Admitting the whole extent and force of the argument, it but proves that, under such a state of facts, the right would be an imperfect one; but surely, it does not prove that it is not a right that has been conferred, because of the exception to its exercise in the particular case supposed. The state law gives the right to exercise the power of voting, where the qualifications and means of enjoyment exist; if, from any particular cause, the party is deprived of the exercise of the right, it by no means proves its non-existence. An alien enemy loses the right of prosecuting civil remedies in time of war; yet, in time of peace he is in the full enjoyment thereof; here it might be said, that because there is a suspension of the right, it does not therefore exist, yet, it is certain, that the right, otherwise perfect, is only suspended for particular causes.

There is a portion of the case which ought not, in my judgment, to escape remark; it is the admission by Spragins that he received and counted the elector's vote, believing at the time that he was not a qualified voter: "he himself," says the case, "believing that the constitution and laws of this state not only required a residence

## (Proof of qualification.)

of six months, but also, that the person offering to vote should be a citizen of the United States." It will also be seen, that this admission forms one of the strong grounds of the judgment of the circuit court; the third reason given, in the record, for the judgment, is in these words: "That the defendant, in admitting and counting the vote of Kyle, at the election referred to, believing, as it seems he did, at the time it was received, that he was not a qualified voter, was guilty of manifest misbehavior." "The defendant, by his conduct at this election, as shown by the facts presented, is brought within the provisions of the section of the law above recited, and is subject to the penalties therein prescribed." When the character of the punishment of a judge of election, for the admission, knowingly, of the vote of any person not qualified to vote according to law, is seen to be that of a large pecuniary fine, and the rendering of him infamous for ten years, it is not without sensations of surprise, that such a confession is seen placed upon the records of a court of justice, by consent. The officer who has here consented to place himself before the court, in what is esteemed a novel attitude, to use no stronger expression, had taken an oath to perform the duties of judge of the election, according to law, and to the best of his abilities, and studiously to endeavor to prevent fraud, deceit and abuse in conducting the election; and he has, it seems, further consented (under what influences it is not pretended to determine) to acknowledge a pretended breach of that duty, which he so solemnly declared, by an oath, he would scrupulously fulfil. If he conscientiously believed the law and constitution to be, what its text does not import, he should, nevertheless, have acted in accordance with his belief and judgment, and refused the admission of the vote tendered. It will not be presumed that this confession, so extraordinary in its character, has been made for the purpose of subserving any particular end, or the accomplishment of any particular object or purpose; but,

(Proof of qualification.)

most assuredly, the inferences cannot but be peculiar in their nature; and the expression, that this part of the case had better have been omitted, cannot be withheld.

After the most careful examination and consideration of the questions raised, the conclusions arrived at are, that Jeremiah Kyle was a person legally qualified, under the constitution and laws of the state of Illinois, to vote at the election specified in the agreed case; and that the judgment of the circuit court, which decided that Kyle, in order to be entitled to vote at such election, should have been either a native or naturalized citizen of the United States, at the time of the presentation and reception of his vote, is erroneous and not warranted in law, and ought to be reversed.

LOCKWOOD, J. I concur in the opinion that the judgment below ought to be reversed, for the following reasons: It appears in the agreed case, that Spragins was sued in the court below, as one of the judges of the election, for the penalty of \$100, given by the 23d section of the "act regulating elections," passed the 10th January 1829; that section provides that "if any judge of the election, clerk or other officer or person concerned in conducting the election, shall knowingly admit any person to vote, not qualified according to law, each and every such person, so offending, shall forfeit and pay to the county the sum of one hundred dollars," &c. R. S. 253-4; Gale's Stat. 265.

The agreed case admits that one Kyle voted, at the general election in 1838, for governor and other officers, and that Kyle was a foreigner and had not been naturalized under the laws of congress, but had resided in the county of Jo Daviess, where the vote was received, for more than six months immediately preceding the election; the case further admits that Spragins acted as a judge of the election, and knew that Kyle had not been naturalized, yet received his vote; it is also admitted, that Spragins be-

(Proof of qualification.)

lieved that Kyle was not a qualified voter, according to the constitution and laws of this state, because he had not been naturalized. In ordinary civil actions, where a defendant admits that he is guilty, such admission would justify the court in giving judgment against him; but this is a highly penal action, and if the defendant is guilty, in addition to a fine of \$100, he is, moreover, on conviction, rendered incapable of holding any office within this state, for the term of ten years thereafter. The admission appears to have been made, with a view to elicit from this court, a construction of the constitution and laws of this state, in relation to the right of aliens to vote. This renders it necessary to decide, whether Spragins, in suffering Kyle to vote, without challenging him, has subjected himself to the penalty of \$100, and disfranchisement for ten years.

The 12th section of the act regulating elections provides, that "when any person shall present himself to give his vote, and either of the judges shall suspect that such person does not possess the requisite qualifications of an elector, or if his vote shall be challenged by any elector who has previously given his vote at such election, the judges of the election shall tender to such person an oath, or affirmation, in the following form: '*I, A. B., do solemnly swear (or affirm, as the case may be) that I am a resident of the county of ———, in the state of Illinois; that I have resided in this state for the period of six months immediately preceding this election; that I have, to the best of my knowledge and belief, attained the age of twenty-one years, and that I have not voted at this election.*' And if the person so offering his vote, shall take such oath or affirmation, his vote shall be received, unless it shall be proved, by evidence satisfactory to a majority of the judges, that such oath or affirmation is false; and if such person refuses to take such oath or affirmation, his vote shall be rejected." R. S. 246-7; Gale's Stat. 263. These are all the provisions contained in the act, in relation to the qualifications of voters.



(Proof of qualification.)

Did Spragins, then, in receiving Kyle's vote, violate this section of the law, so as to subject him to the penalty contained in the 23d section of the act? I think not, for the reason, that it is agreed, that Kyle was a resident of Jo Daviess county, and had resided in the state for more than six months immediately preceding the election. Had Kyle been challenged, he would only have been required to swear to what is admitted to be the fact by the agreed case; a challenge, then, by Spragins, was wholly unnecessary, and would have been an act of supererogation on his part. If Kyle had taken the oath, and it appears he could safely have done so, the judges of election would have been compelled to receive it; they have no discretionary power, for the law is imperative, that the vote shall be received, unless evidence is produced that it is false. This falsity can only be proved to exist, by showing that the person offering to vote has not resided in the state for six months immediately preceding the election, or that he is not twenty-one years of age, or that he has voted before at the election.

Whether the person offering to vote is an unnaturalized foreigner, is a question which the judges of election have no right to investigate, under existing laws. If the voter comes within the letter of the law, the duty of the judge is plain. There is no ambiguity in the word "resident;" every man is a resident who has taken up his permanent abode in the state. The question, then, whether Kyle was an *inhabitant*, and entitled to the right of suffrage, within the meaning of that word in the constitution, is not a subject of inquiry by the judges of the election. I am, therefore, of opinion, that Spragins, in admitting Kyle to vote, has not violated the statute, and is, consequently, not liable to the penalty. On the constitutional question, whether unnaturalized foreigners, who are permanent residents of the state, have a right to vote, I forbear to express an opinion, as I believe, while our election laws remain as they are, the judges of election are bound to receive the

(Proof of qualification.)

votes of such persons. In support of the views above expressed, in relation to the meaning of the word "resident," I refer to the case of *Brown v. Keene*, decided in the supreme court of the United States, 8 Pet. 112, where that court held, that the word "resident" does not mean a citizen.

WILSON, C. J. I concur in the view taken of this case by Justice Lockwood, in his opinion, and think the judgment of the circuit court should be reversed, upon the ground that Spragins, the judge of the election, has not incurred the penalty of the statute, in receiving the vote of Kyle, inasmuch as the existence of all the requisite qualifications which the statute requires, in order to entitle him to vote, are admitted. It is only when the judge of the election allows the exercise of the elective franchise by one whose right he suspects, or whose vote is challenged by another, without tendering the oath prescribed by the statute, that the judge violates his duty. The broad and important question of the right of suffrage, under the constitution, does not, according to my view of this case, arise; it is one, therefore, upon which I express no opinion.

BROWNE, J., said that he concurred in the views taken of the case by Justice Lockwood.

Judgment reversed.

---

In New York, the election officers, except in certain special cases (as where the party has been convicted of a crime, or has made a bet on the election), have no power to decide upon the qualifications of a voter; they cannot reject a vote, if the elector be willing to take the oath prescribed by law; the voter is made the judge of his own qualifications, and his conscience, for the occasion, takes the place of every other tribunal. If there be any doubt of the voter's qualifications, the inspectors

## (Proof of qualification.)

are required to examine him, on oath, touching the same, and if, in their opinion, he be not duly qualified, they are to admonish him as to the points in which they consider him deficient ; nevertheless, if, after this, he persist in his claim to vote, they are compelled to administer to him the general oath, in which he affirms the possession in himself of all the legal qualifications, and if he take the oath, his vote must be received ; the inspectors have no discretion in the matter ; they can only reject the vote, if he refuse to answer fully the interrogatories put to him touching his qualifications, or to take the general oath. *People v. Pease*, 30 Barb. 588 ; s. c. 27 N. Y. 45.

In Pennsylvania, an elector whose name has been omitted from the registry, must make proof of his residence by the oath of at least one qualified voter of the district ; and must himself take and subscribe an affidavit of his possession of all the legal qualifications. *Purd. Dig.* 1556. And after this has been done, the election officers are still the judges of his qualifications, and have power to receive or reject the vote, without any responsibility to the disfranchised elector, provided only they act without malice. See *Kneass' Case*, 2 Pars. 553.

The point so elaborately argued by Justice Smith, in *Spragins v. Houghton*, is fully sustained by the unanimous decision of the supreme court of Pennsylvania, in *Stewart v. Foster*, 2 Binn. 110, where it was held, that alien residents of the borough of Pittsburgh were qualified electors for borough officers ; the law conferred the elective franchise upon the *inhabitants* of the borough, who had resided therein for one year immediately preceding the election, and within that time paid a borough tax ; and the court held, in accordance with the opinion of Mr. Justice Smith, that the word "inhabitant" did not mean "citizen." In Massachusetts, however, the supreme court came to the conclusion, that the authority to vote, given to inhabitants and residents, was restricted to such as were citizens. *Opinion of the Judges*, Cush. Elect. Cas. 120 ; *Harvard College v. Gore*, 5 Pick. 370. And see *Case of Malden*, Cush. Elect. Cas. 377.

## JENKINS v. WALDRON.

In the Supreme Court of New York.

MAY TERM 1814.

(REPORTED 11 JOHNSON 114.)

[*Liability for rejecting the vote of a qualified elector.*]

An action on the case will not lie against the inspectors of an election for refusing the vote of a qualified elector, unless on proof of *malice*, express or implied.

Waldron brought an action on the case against Jenkins and others, as inspectors of the election held in Hudson, Columbia county, in April 1811, for refusing to receive his vote as an elector.

The plaintiff stated in his declaration that the defendants were inspectors of the poll in the city of Hudson, at the general election in 1811; that the plaintiff was duly qualified to vote for members of the assembly; that he tendered his vote to the defendants, and that they wickedly and designedly refused his vote, and would not permit him to exercise the right of suffrage. The defendants pleaded the general issue.

*Van Buren*, for the plaintiffs in error. This action will not lie without alleging and proving that the defendants acted wilfully and maliciously, &c. The plaintiff must prove corruption, and a design to injure the plaintiff. The action does not lie for a mere error of judgment. *Harman v. Tappenden*, 1 East 555. *Drewe v. Coulton*, Ibid. 563 note.

*Strong*, for the defendant, cited and relied on the case of *Ashby v. White*, 2 Ld. Raym. 938, 950; s. c. 6 Mod. 45; *Holt's Rep.* 524; 1 Bro. P. C. 45.

(Liability for rejecting vote of qualified elector.)

SPENCER, J., delivered the opinion of the court. It is not necessary to the decision of this cause, to pronounce any opinion on the question, whether Judge Edmonds was a judge *de jure*, or *de facto*, when he gave the certificate that the defendant had duly proved himself to be a free man; for, admitting that Judge Edmonds was either, the action, as laid, is not maintainable. It is not alleged or proved that the inspectors *fraudulently* or *maliciously* refused to receive Waldron's vote; and this we consider to be absolutely necessary to the maintenance of an action against the inspectors of an election.

The case principally relied on by the counsel for the defendant in error is that of *Ashby v. White*, 2 Ld. Raym. 938. There the declaration alleged that the rejection of Ashby's vote was done fraudulently and maliciously, and, although the jury found the defendant guilty, the judgment was arrested by three judges, in opposition to the opinion of Chief Justice Holt. This judgment was afterwards reversed in the House of Lords; the reasons for the reversal do not appear in the report of the case; but the ground of the reversal is distinctly stated in the resolutions of the Lords, in answer to the resolutions of the Commons, reprehending the bringing the action, and the judgment thereon. The first resolution of the Lords states, "that by the known laws of this kingdom, every freeholder, or other person having a right to give his vote at the election of members to serve in parliament, *and being wilfully denied, or hindered so to do*, by the officers who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and to recover damages for the injury." 1 Bro. Parl. Cas. 49.

The case of *Harman v. Tappenden and others*, 1 East 555, and *Drewe v. Coulton*, in a note to this case, clearly show that this action is not maintainable, without stating and proving malice, express or implied, on the part of the officers. In the case in the text, Lawrence, J., said "there is no instance of an action of this sort maintained for an

(Liability for rejecting vote of qualified elector.)

act arising merely from error of judgment;" and he cited Mr. Justice Wilson's opinion in *Drewe v. Coulton*, with approbation. In that case the suit was for refusing the plaintiff's vote. Justice Wilson considered it as an action for misbehavior by a public officer in the discharge of his duty, and that the act must be malicious and wilful to render it a misbehavior; and he held that no action would lie for a mistake in law. In speaking of the case of *Ashby v. White*, he considered it as having been determined by the House of Lords on that ground, from the resolutions entered into by them. The whole of Judge Wilson's reasoning is clear, perspicuous and irresistible; and is fully confirmed in *Harman v. Tappenden*. It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers, called upon to exercise their deliberative judgment, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.

Judgment reversed.

---

The rule laid down in *Jenkins v. Waldron*, that an election officer is not liable, either civilly or criminally, for refusing the vote of a qualified voter, unless on proof of malice, has been generally followed by the courts of the several states. In Pennsylvania, the question came before the supreme court in the case of *Weckerly v. Geyer*, 11 S. & R. 35, which was an action in the case for wrongfully refusing the plaintiff's vote at a corporate election, and Tilghman, C. J., said: "We have no doubt that malice is an ingredient, without which the action cannot be supported. By malice, I mean, the refusal of a vote from improper motives, and contrary to the inspector's own opinion. It is not necessary that this should be expressly proved; the jury may infer it from circumstances; direct and positive proof, in a case of this kind, is hardly to be expected. But a man who is placed in a public station, as an officer of the commonwealth, or of a corporation, in which, though not strictly a judicial office, he must necessarily exercise his judgment (such as an inspector or judge of an election), is not liable to an action, provided

(Liability for rejecting vote of qualified elector.)

he act with purity and good faith; but that he is responsible, if he act wilfully and maliciously, was decided by the English House of Lords in the case of *Ashby v. White*, 1 Bro. P. C. 49, and has been held for law ever since." And see 2 Peckwell 17, 22; *Cullen v. Morris*, 3 Stark. 506.

The same point was ruled, in *Moran v. Rennard*, 3 Brewst. 601; *Commonwealth v. Sheriff*, 1 Brewst. 183; and *Commonwealth v. Lee*, Ibid. 273 (both of which two last cases were criminal prosecutions). In *Commonwealth v. Lee* (ante 100), Judge Butler said: "The officer is not made responsible for a mistake of judgment; if he rejects the vote of one whom he believes not qualified, he is not liable to the penalties of the statute, although the individual may have been qualified and entitled to vote. It is for a wilful disregard of his duty, that he is made liable to punishment, and not for an error of judgment. The statute did not, in this respect, create a new offence; the rule of the common law was the same. A public officer, required to exercise judgment, must do so conscientiously; nothing more is required; to punish him for an honest mistake would be cruel; if the law were otherwise, no sensible man would be found willing to occupy such an office." To the same effect is the case of the *United States v. Gillis*, 2 Cranch C. C. 44; *State v. McDonald*, 4 Harrington 555; *State v. Porter*, Ibid. 556.

The same rule prevails in New Hampshire, *State v. Smith*, 18 N. H. 91; *State v. Daniels*, 44 N. H. 383: in Delaware, *State v. McDonald*, 4 Harrington 555; *State v. Porter*, Ibid. 556: in Indiana, *Carter v. Harrison*, 5 Blackf. 138; *State v. Robb*, 17 Ind. 536: in North Carolina, *Peavey v. Robbins*, 3 Jones (Law) 339: in Kentucky, *Caulfield v. Bullock*, 18 B. Mon. 494; *Morgan v. Dudley*, Ibid. 693; *Miller v. Rucker*, 1 Bush 135: in Tennessee, *Rail v. Potts*, 8 Humph. 225: and in Maryland, *Bevard v. Hoffman*, 18 Md. 479; *Anderson v. Baker*, 23 Md. 531 (ante 27).

But in other states, it is held, on the contrary, that an action lies against election officers for unlawfully rejecting the vote of a qualified elector, though such refusal were without malice. Thus, in Massachusetts, it is held, that although the selectmen of a town cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct be the effect of corruption, or some wicked and base motive; yet, that a civil action will lie against them, without regard to the question of malice. In *Lincoln v. Hapgood*, 11 Mass. 350, Chief Justice Parker said: "The decision of the selectmen is necessarily final and conclusive, as to the existing election; no means are known, by which the rejected

(Liability for rejecting vote of qualified elector.)

vote may be counted by any other tribunal, so as to have its influence upon the election; or, at least, no practice of that kind has ever been adopted in this state. There is, therefore, not only an injury to the individual, but to the whole community; the theory of our government requiring that each elective officer shall be appointed by the majority of the votes of all the qualified citizens, who choose to exercise their privilege. Now, if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right, and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights, and restoring himself to the rank of an active citizen. Such a doctrine would be inconsistent with the principles and provisions of our free constitution, and must give way to the necessity of maintaining the people in their rights, secured to them by the form of their government."

So too, in *Gates v. Neal*, 23 Pick. 308, it is said by Shaw, C. J., "that if any person duly qualified to vote whose name is upon the list of voters, and who has, in other respects, complied with the requisitions of the law, is prohibited from voting by the selectmen or other officers whose duty it is to superintend elections, he shall be considered as deprived of a valuable right, and may maintain an action therefor, without being required to prove that such officer acted from malice, or from any unlawful or unjustifiable motive. This was long since held, upon the ground, that it will afford the best security to this high and important privilege, and that, without it, a voter might often be refused his privilege upon slight and frivolous grounds, but yet under such circumstances, as to render it difficult, if not impossible, to prove actual malice in the officers superintending the elections." The same point was ruled in *Blanchard v. Stearns*, 5 Met. 298. And see *Capen v. Foster*, 12 Pick. 485 (ante 51); *Bacon v. Benchley*, 2 Cush. 100.

The like rule prevails in Ohio, *Jeffries v. Ankeny*, 11 Ohio 372; *Anderson v. Milliken*, 9 Ohio St. R. 568: and in Wisconsin, *Gillespie v. Palmer*, 20 Wis. 544.

In the states, however, in which this latter view prevails, the action is regarded as one for the determination of the plaintiff's abstract right as an elector, and he is confined to nominal damages, unless on proof of



## (Liability for rejecting vote of qualified elector.)

malice, or other unlawful motive. *Lincoln v. Hapgood*, 11 Mass. 357; *Blanchard v. Stearns*, 5 Met. 298; *Capen v. Foster*, 12 Pick. 487 (ante 52); *Gates v. Neal*, 23 Pick. 310. If, however, they act wilfully and corruptly, they are liable to exemplary damages. *Elbin v. Wilson*, 33 Md. To sustain such action, the plaintiff must show affirmatively, that he offered sufficient evidence to the defendants of his qualification as a legal voter. *Blanchard v. Stearns*, 5 Met. 298; *Lombard v. Oliver*, 7 Allen 155. Otherwise, this anomalous state of facts might exist, that the elector, although unable, at the proper time, to prove his qualification, in the mode prescribed by law, might afterwards, on the trial of an action against the election officers, or of a contested election, prove conclusively, by what the courts would deem legal evidence (although such as the election officers were not permitted to receive), that he was, on the day of election, a duly qualified voter under the state laws. Thus, an unassessed voter, in Pennsylvania, is required by law to prove his residence within the election district, by the oath of a qualified elector; this he might not be able to do, on the election day, yet, on a subsequent trial, he might be able to prove the fact, by the oaths of many witnesses who, though not qualified electors, were competent, by the rules of the common law.

Election officers are generally punishable by indictment, for knowingly receiving the vote of one who is not a duly qualified elector. *State v. Roll*, 7 West. L. J. 138; *State v. McDonald*, 4 Harrington 555. The specified offence, however, must be set forth in the indictment; it is not enough to charge it in general terms. *Commonwealth v. Miller*, 2 Pars. 480. And the act must be alleged to have been "unreasonable, corrupt or wilfully oppressive." *State v. Small*, 1 Fairf. 109. So, different election officers, charged with distinct duties, cannot be joined in the same indictment. *Commonwealth v. Miller*, 2 Pars. 480. If, however, the statute make either of two or more distinct acts, connected with the same general offence, and subject to the same measure and kind of punishment, indictable separately, and as distinct crimes, when committed by different persons, or at different times, they may, when committed by the same person, at the same time, be coupled in one count, as constituting one offence. *Byrne v. State*, 12 Wis. 519. The offence consists in wilfully and corruptly doing an act, or omitting a duty, which a person acting in a public capacity *knows* it to be his duty to do, or

(Right of interested parties to vote.)

omit, in disregard of his official duty and the obligations of his oath. *State v. Porter*, 4 Harrington 556.

Registering officers are not responsible in damages for refusing to register an elector, however erroneous their refusal may be, if produced merely by a mistake in judgment; but if they act corruptly or maliciously, they are liable to the person injured. *Pike v. Megoun*, 44 Mo. 492. They are judicial officers, and their decisions are of a judicial nature. *State v. Staten*, 6 Cold. 234.

---

## COMMONWEALTH v. McCLOSKEY.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1830.

(REPORTED 2 RAWLE 369.)

[*Right of interested parties to vote.*]

On the trial of a contested election, the members returned as elected, though sworn in, are not competent to vote on the question of the validity of their own election.

Rule to show cause why an information in the nature of a writ of *quo warranto*, should not be filed against the defendants, James McCloskey, John Paisley and David Farrell, to inquire by what authority they exercised the office of commissioners of the township of Moyamensing, in the county of Philadelphia.

The act of assembly of the 24th March 1812 provided that the board of commissioners should consist of nine persons, three of whom should be elected annually, to serve for three years. That the three persons who should have the highest number of votes for said office, together with the six commissioners, whose time should not have expired, should meet on the first Monday of April succeed-

(Right of interested parties to vote.)

ing such election, and receive the return of the commissioners elect, and should forthwith proceed to examine the same and to judge and determine thereon; and for that purpose, the said commissioners, or a majority of them, should be judges of the said election; and should have full power and authority to approve thereof, or to set aside the same, and to order new elections, as the case might require.

On the 20th March 1829, an election was held for three commissioners, to serve for three years; the defendants were returned as duly elected. On the first Monday of April, the board of commissioners were convened; five of the old commissioners were present, and one was absent. A memorial signed by fifteen inhabitants of the township, complaining of corruption and illegality in the election, was presented to the board, accompanied by depositions tending to prove that three illegal votes had been received; and an offer was made to prove other illegal votes.

The three commissioners elect had been sworn into office previously to the meeting of the board; at the meeting, they insisted on voting to approve their own election; two of the old commissioners asserted the right of the three commissioners elect to vote, but the other three protested against it. They divided and formed two separate bodies; the three commissioners elect, and two of the commissioners holding over, constituted themselves a board, and organized by the election of officers. The other three remaining commissioners, together with the one who was at first absent, but afterwards attended, organized themselves into another board.

The former, composed partly of the commissioners elect, refused to receive the memorial; the latter body received it, and notified the defendants to appear on the 15th April, when they would proceed to examine into and determine the validity of the election. The commissioners elect did not appear, whereupon the board proceeded to a hearing of the case, declared the election void, and ordered a new

(Right of interested parties to vote.)

election to be held. An election was held accordingly, at which James Ronaldson, Robert Thornton and Samuel Parker were declared duly elected; the other party not participating in the election. The four old commissioners received the returns of this last election, and admitted the persons returned as members of the board. The question before the court was, the right of the defendants to act as commissioners.

*J. Randall* and *P. A. Browne*, for the relator.

*Dallas* and *Binney*, for the defendants.

ROGERS, J., delivered the opinion of the court. On the 20th of March 1829, the respondents were elected to serve for three years, as commissioners of the township of Moyamensing. It appearing, at the close of the polls, that they had the highest number of votes, and the judges having given them notice of their election, on the 2d of April 1829, they took the oath of office. The judges, in pursuance of the second section of the act of incorporation, returned the respondents as duly elected. Before the meeting of the commissioners, which is directed to be on the first Monday in April, a memorial, respectful in its terms, was prepared and signed by a number of the legal voters of the township, alleging that sundry abuses were practised, and many votes taken of persons who were not citizens qualified to vote for members of the general assembly, and praying that the abuses might be inquired into, according to law; and they annexed to their memorial evidence of the illegality of three votes.

At the time appointed for the meeting of the commissioners, viz., the first Monday of April (present Edward Smith, Jacob Thomas, Robert McAfee, Samuel Bell, George Kirkpatrick, commissioners, and the defendants, John Paisley, David Farrell and James McCloskey, commissioners elect), Edward Smith stated, he wished to lay

(Right of interested parties to vote.)

before the board a remonstrance contesting the election. The remonstrance was not suffered to be read, nor was any vote taken on it, but it was ordered to lie on the table, by George Kirkpatrick, who had been elected president *pro tempore*. The returns of the election were then read, whereby it appeared that John Paisley had 217 votes, James McCloskey had 155 votes, and David Farrell had 150 votes. There is then this entry on the minutes, "adopted by the majority of the board," which, though informal, amounts, in substance, to an approval of the election of the respondents. Edward Smith, Jacob Thomas and Robert McAfee were opposed to the approval. The oath of office of the commissioners elect was then read, together with a notice of their election. The board, namely, the commissioners elect, and two of the commissioners of the old board, went into an election for president and other officers, Jacob Thomas, Edward Smith and Robert McAfee refusing to take any part in the proceedings.

The 10th of April 1829, at a special meeting of the commissioners (present, Edward Smith, Jacob Thomas, Thomas Query and Robert McAfee), Mr. Query presented the memorial of sundry inhabitants, complaining of certain abuses practised at the election held on the 20th of March, which being read, on motion, it was resolved, that on the 13th inst., they would inquire into the abuses complained of in the memorial. And on the 13th inst. (having previously given notice to the respondents, who did not attend), they did inquire, set aside the election, and ordered a new election to be held on the 23d of April inst., which resulted in the choice of James Ronaldson, Robert Thornton and Samuel Parker, whose election was approved by the four commissioners above stated.

This is an application, in the case of a public corporation, for a rule to show cause by what authority the respondents claim to exercise the duties of commissioners of the township of Moyamensing. The question arises on the 3d and 5th sections of the act of assembly of the 24th of March

(Right of interested parties to vote.)

1812; entitled "an act to incorporate the township of Moyamensing in the county of Philadelphia."

From the facts which have been disclosed, it is apparent, that the approval of the election of respondents, depends altogether on their own vote, and that independently of that vote, there had not been that confirmation of the election, which is required by the act of incorporation. The inquiry then will be, to which all others are subordinate in some measure, whether the act of assembly authorizes this proceeding on the part of the commissioners elect; whether each of them who has been returned elected, is entitled to judge of his own election, with full power and authority to approve thereof.

It will be conceded, that where it can be avoided, no man should be permitted to decide his own cause; nor can I perceive much difference, where he is called on to determine his right to an office of profit, or one of trust, accompanied as this is, with extensive patronage. The temptation to an abuse of the trust, is as great in the one case, as the other; and is such, that no prudent legislature would entrust such a power to any person, unless in cases of necessity; and where such necessity exists, the legislative grant would, we should be led to suppose, be in such clear, unequivocal terms, as to leave room for neither doubt nor cavil. In England, it is said, that even an act of parliament, made against *natural equity*, as, to make a man a judge in his own cause, is void, in itself; for, as it is expressed, *jura naturæ sunt immutabilia*; they are *leges legum*. *Davy v. Savadge*, Hobart 87. And in 12 Mod. 687, if an act of parliament should ordain, that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament; for, it is impossible, says the court, that one should be judge and party; for the judge is to determine between party and party, or between the government and a party.

And our own courts appear equally averse to the intro-

(Right of interested parties to vote.)

duction of such a principle. An act of the legislature, says Judge Chase, in *Calder v. Bull*, 3 Dall. 386, contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded; a law that punishes a citizen for an innocent action, or in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that *makes a man a judge in his own cause*; or a law that takes property from A. and gives it to B.; it is against all reason and justice, for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed they have done it. The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. To maintain, that our federal or state legislatures possessed such powers, if they had not been expressly restrained, would be a political heresy, altogether inadmissible in a republican government. To these high and imposing authorities, I may add the opinion of the present chief justice (Gibson) in *Commonwealth v. Woelper*, 3 S. & R. 43; which it is a mistake to suppose was overruled or contradicted by the other members of the court.

In this view, the right claimed by the respondents, struck the judicial mind in England, and in this country, and particularly the powerful intellect of Justice Chase. Although I fully accede to the general principle of that distinguished jurist, yet, I should pause, before I would carry it to the extent he seems willing to go. If the legislature should pass a law in plain, unequivocal and explicit terms, within the general scope of their constitutional authority, I know of no authority in this government to pronounce such an act void, merely because, in the opinion

(Right of interested parties to vote.)

of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or, at least, not in harmony with the structure of our ideas of rational government. Justice is regulated by no certain or fixed standard, so that the ablest and purest minds might sometimes differ with respect to it. Besides, necessity dispenses with those general principles, and the legislature must be the judges when the necessity exists—when the exigencies of society require the investment of such extraordinary powers. It must, undoubtedly, rest in their wisdom, to determine when the public welfare, to which all else must be subservient, requires the assertion of such principles. Whilst I, then, in some measure, disclaim the doctrines of that eminent man, yet, the relator has a right to claim the benefit of another rule of construction. Unless the words of the act be plain and explicit, the court is bound, in decency, to conclude, that the legislature had no intention to violate the principles of equity, or, without necessity, to contravene the first principles of the social compact; that as it is against reason and justice, and the fruitful source of faction, corruption and abuse, that a party interested should judge his own case, it is not to be presumed, but directly the contrary, that the legislature have invested the respondents with such extraordinary powers.

I have looked, in vain, into the 3d section, which has been mainly relied on by the respondents, for any express words or necessary implication, authorizing the commissioners elect, each in his own case, to examine and judge of the election. The legislature had in view the original organization of the corporation, and its continuance, by the election of three members each year, to supply vacancies occasioned by the rotary principle provided by the act. Hence, an ambiguity has arisen in the phraseology



(Right of interested parties to vote.)

of the act, from not accurately distinguishing the manner of proceeding at these periods, which are so essentially different. From necessity, at their organization, they may be permitted to verify their own powers, and perhaps without the sanction of an oath; but even then, this may be done without violating a principle of American as well as English jurisprudence, founded in natural equity, and laid down by eminent jurists, as an acknowledged principle of universal law. Each one must be permitted to vote in the case of his fellows, but not in his own; the election of one of the nine might well be questioned, without interfering with the rights of the others. After the corporation has been called into being, no necessity can ever be pretended; as then there are persons, acting under the sanction of an oath, competent to decide upon the conflicting claims in a contested election.

The 3d section provides that the nine persons who shall, at the next election to be held in pursuance of this act, have the highest number of votes for the office of commissioners, shall meet together, &c., on the first Monday in April next following the election; and that the three persons who shall, at every subsequent election, have the highest number of votes for the said office of commissioners, together with the six commissioners whose time shall not have expired, shall meet together, at such place as shall be legally appointed, &c., on the first Monday of April next following each and every election to be held in pursuance of this act; and shall, then and there, receive the said returns of commissioners elect, and shall forthwith proceed to examine the same, and to judge and determine thereon; and for that purpose, the said commissioners so met, or a majority of them, shall be judges of the said election, and shall have full power and authority to approve thereof, or to set aside the same and to order new elections, as the law may require, to be held in the manner hereinbefore directed, and at such times as shall be by them appointed, &c.

(Right of interested parties to vote.)

The fixing of a particular day for the meeting of the commissioners and the commissioners elect, is necessary, because in case there should be no dispute, the members of the board would be in attendance, and in readiness to enter upon the discharge of the duties of their office; and in this point of view, it was a prudent precaution. As the scrutiny into the qualification of voters is usually made at the polls, the examination of the returns and the approval of the election, are, in a great majority of cases, matters of form. But where there is reason to believe the returned members have not been duly elected, it becomes a different affair; then another and more careful scrutiny takes place, before a tribunal on which devolves a most important duty, to examine, judge, approve or set aside the election. The act says, "and for that purpose, the said commissioners so met, or a majority of them, shall be judges of the said election;" that is to say, for the purpose of examining and judging, the commissioners shall be the proper tribunal.

What then do the legislature mean by the terms, the "commissioners so met?" In my judgment, they intended to designate commissioners, in the strict and legal sense of the word. Who then is a commissioner? No person can be considered as such, until he is duly qualified to perform all the duties of the office; and this can only be, when he has been elected, returned, his election approved, and when he has duly taken the oath of office. The "commissioners so met," means the commissioners whose time has not expired, in exclusion of the commissioners elect; and in aid of this idea, it would seem, the legislature has discriminated, although not in very plain terms, between commissioners and commissioners elect. If the legislature intended otherwise, it would have been very easy to have expressed their meaning in such precise and definite terms, as to have avoided all difficulty. Not having done so, we feel ourselves at liberty, nay, bound, in common decency, to suppose they did not wish to be so

(Right of interested parties to vote.)

understood; we are authorized to believe they did not intend to establish a principle, which has been deemed by the most eminent jurists, contrary to natural equity and the first principles of the social compact. On the contrary supposition, the approval of the election would be a mockery; as we could not suppose, particularly with the knowledge of the facts which have been disclosed, that an interested party, under the influence of irritated and party feelings, could bring to the examination that impartiality which is necessary to a proper and correct decision. We exclude a juror or a witness when he is interested, and much more so ought we to guard from pollution the determination of the most sacred right, the republican principle, which has been engrafted into this state, that it is the majority of legal voters who shall confer the office.

If the question, then, depended entirely on the 3d section, I should say, the commissioners elect had no right to vote, when their own election was in dispute. But this is rendered still more plain by the 5th section, which provides, that "each and every commissioner who shall be elected and returned, and whose election shall be approved in manner aforesaid, shall, before he enters on the execution of his said office, be sworn or affirmed before some justice of the peace of the county, well and faithfully to execute the office of commissioner of the said township; and shall thereupon, without any further or other commission, enter upon the duties thereof, and shall hold and exercise the same for the term for which he shall have been elected as aforesaid."

The oath of office was administered to the respondents before the election was approved, and even before the return of the election, although after they had received notice from the judges. I do not perceive why the justice might not as well have sworn them in, when they were put in nomination, on the ground of the certainty of their election, and the presumption, that the election would be approved; it would no more have been a violation of the

(Right of interested parties to vote.)

letter, and, I believe, the spirit of the act, in the one case than in the other. The section provides that the commissioners shall be elected and returned, and approved, and then sworn; and this is the natural order of proceeding; first, we have the election; then the judges return the highest in vote; after which, the legal tribunal approves or sets aside the election; and if the election be approved, then, and not till then, the person who has been elected, returned and approved of, shall be sworn well and faithfully to execute the office of commissioner of the township, and shall thereupon (that is to say, after his election shall have been confirmed), without any further or other commission, enter upon the duties of his office.

But what are the duties of the office. The first duty a commissioner has to perform on the meeting of the board, in every year, is, to examine, to judge and determine on the election of such members as may be returned by the judges, to supply the vacancies in the board. If, then, I am right in supposing, that the oath ought not to be administered to the commissioners elect, until their election be confirmed, it is a strong argument to show, that the legislature did not intend that they should take any part in the inquiry, when it ceases to be a matter of form, and becomes matter of substance, by the presentation of a respectful memorial, complaining of an undue election. Surely, it was not contemplated, that some should act with oath, and others without oath; and that those who had not been sworn, should be the persons who were interested in the decision. When the respondents claim the privilege of voting, it is reasonable to object, that they cannot vote without having taken the oath, and that the oath cannot be lawfully administered, until the approval of the election by the tribunal legally constituted for that purpose.

The constitution of the United States prescribes "that each house shall judge of the elections, returns and qualifications of its own members;" the constitution of Penn-

(Right of interested parties to vote.)

sylvania, in nearly the same words, "that each house shall judge of the qualifications of its members." The right of determination is given to the house, who exercise their authority by the decision of the majority, as in this act it is vested in the commissioners, or a majority. Under these different provisions, no instance can be produced, either in congress or our state legislature, where such a right has ever been permitted, or even claimed. The nearest they have ever gone to it, in congress, was, where returned members voted on a principle, on which their own election depended; a case entirely different from this, and the propriety of which might well be questioned; at any rate, I feel but little respect for a decision which comes in such a questionable shape.

However this may be, we know this cannot occur in our state legislature, for by the act of the 29th of September 1791, upon a petition signed by twenty qualified electors, complaining of an undue election, being presented to the senate or house of representatives, they select a committee, appointed by lot, in the manner pointed out by the act, to determine the contested election, whose report, when entered on the journals, is final and conclusive; and so far from the person whose election is contested, being entitled to vote, the returned member and the candidate next highest in vote, are made parties in the trial. We must, therefore, seek in vain for any analogy to the present proceeding, in the constitution of the United States and of this state, and the practice which has obtained in congress and our state legislature.

In the warmly-contested election for Westminster in 1784, Mr. Kenyon (afterwards Lord Kenyon) denied the right of Mr. Fox, who, at the time, was a member for a small borough in the Orkneys, of being present at the discussion, and asserted, that even hearing him was an indulgence. Against the principle of the assertion, Mr. Fox directly protested, maintaining, that he had not only the right to speak, but a positive and clear right to vote;

(Right of interested parties to vote.)

this claim he grounded on the fact, that he was a member of parliament, and he was advocating the right of the electors of Westminster, rather than his own pretensions. We cannot admit that this, as has been insinuated, is any authority in favor of the respondents, particularly, taken in connection with the fact, that he neither voted nor offered to vote.

The respondents have relied on several acts of assembly wherein, they state, similar powers have been conferred by the legislature. If the acts of assembly are the same as in the incorporation of the district of Southwark and the Northern Liberties, it proves nothing more than that our decision may affect more than the township of Moyamensing; and is, of course, as we are well aware, an unimportant question. They, however, shed no light on the construction of the act, unless the counsel had, in addition, shown an adjudication in accordance with the rule for which they contend. If different, I cannot perceive they are entitled to the slightest weight. It will, however, be seen, by reference to those acts, that the legislature have not, even in terms, departed from the principles which I have advocated; that the provisions of the act may not be ineffectual, they have made them judges of their own election; the legislature by no means say, that a member of council shall or may vote when his own election is contested, but that the common councilmen, or a majority of them, shall exercise that right; a principle similar to that which has been introduced into the constitution of the United States and of this state.

If the right of one or two, or more, was disputed, it would be very clear to me, that the interested party could not interfere in the decision; and even if the election of the whole of them was in contest, they might, and, I think, ought, as in the case to which I have alluded, vote on the principle, without each one voting directly on his own case; and even this could only be justified on the plea of necessity, to prevent a failure of the act of incor-

(Right of interested parties to vote.)

poration. *For a man to constitute himself a judge in his own cause is indelicate and indecent.* It is not necessary to prevent a failure of the corporation, nor is it within the spirit or words of the act, which gives the decision to the councilmen, or a majority of them, who are authorized to judge of the election of their own members. The legislature have been cautious not to extend the power further than the necessity of the case may require, and within these limits they may be allowed to act; and unless the legislature expressly say otherwise, they shall not be permitted to go, with my consent, a step further.

But it is said, the power may be abused, and of this, if we could have had any doubt before, we have been abundantly satisfied by the facts which have been disclosed in this investigation. If, however, they have acted corruptly, they are amenable to the laws, and to the opinion of their fellow-citizens, which, in most cases, may prove a sufficient restraint. It is also equally within the limits of probability, that the judges of the election may be within the sphere of the same corrupt and factious influence, by which they may be induced to make an improper return; and if the returned members may be permitted to confirm their own election, it would lead to equal, if not greater mischief.

If, then, this matter rested here, I should have no difficulty in saying that the rule should be made absolute. But as has been already stated, at a special meeting of four of the commissioners, they undertook to set aside the election, and order a new election, which resulted in the choice of three other gentlemen, to supply the vacancy in the board. At the first election, it appeared, that John Paisley had 217 votes, James McCloskey, 155 votes, and David Farrel, 150 votes; whereas, the highest of the other candidates had but 147 votes. Two questions then arise: 1. Have the commissioners power to decide, without examination or control by the supreme court? and—2. If we have power to interfere, is this such a case, in which

(Right of interested parties to vote.)

it is the duty of the court to interpose, in consequence of an improper exercise of authority by the commissioners?

The act says that the commissioners, or a majority of them, shall be judges of the election, and shall have full power and authority to approve thereof, or to set aside the same and to order new elections, as the law may require; from this it has been inferred, that the court are ousted of their jurisdiction. By the act of the 22d of May 1722, the supreme court have full power and authority to issue forth writs of habeas corpus, certiorari and writs of error, and all remedial and other writs and process; and generally, they are empowered to minister justice to all persons, and to exercise the jurisdictions and powers, &c., as fully and amply, to all intents and purposes whatsoever, as the justices of the courts of king's bench, common pleas and exchequer, at Westminster, or any of them, may or can do. This is a great, full and plenary power to the court, wisely entrusted to them for the public welfare, and which we are bound to exercise on the complaint of persons aggrieved. Under this law, the supreme court have been in the constant practice of granting informations in the nature of a writ of *quo warranto*, for exercising an office in a private as well as a public corporation; not by force of the statute of 9 Ann. ch. 9, but by power derived from the common law. As the jurisdiction of the court has been expressly granted, it cannot be taken away, except by express words or necessary implication, neither of which appears in this act.

When the legislature gives full power and authority to approve or set aside an election, I cannot believe that they intended that the supervising jurisdiction of the supreme court should be taken away. These words cannot have greater effect, than the words, "final and conclusive between the parties," used in a great variety of acts of assembly; and yet, it is a well-settled principle, that these expressions do not take away the jurisdiction of the court. The legislature, being aware that this is a well-settled



(Right of interested parties to vote.)

rule of construction, would, if they had intended to preclude inquiry, have prevented this court from exerting their superintending authority, by express prohibition. This case furnishes a reason against the placing or putting of public or private corporations above the reach of inquiry.

And this leads to the second question, whether there was a rightful exercise of authority, in setting aside the election of the respondents? As regards Mr. Paisley and Mr. McCloskey, there cannot be the slightest particle of doubt; Mr. Paisley had a majority of seventy, and Mr. McCloskey, a majority of eight votes. How the commissioners could have supposed they were justified in setting aside their election, on the proof of two, or, at most, of three illegal votes, passes my comprehension. I see no reason for supposing that the judges of the election were corrupt, though they may have been mistaken. Edward Smith, one of the commissioners, says, that they inquired into the circumstances of the election held on the third Friday of March; witnesses were examined by the commissioners, on the subject of the election; it was proven, that persons had voted at that election who were not entitled to a vote, persons who did not reside in the township, and persons who were not authorized to vote in the township; by the latter description, he says, he means aliens; in his cross-examination, he says, they made no inquiry as to whom they voted for; Robert Parker, an alien, voted; he was qualified, in the presence of the commissioners, that he had voted and that he was an alien; John Woods and Daniel Daniels voted; these were all that it was proven against, that he recollects. Although it is clear, that the first two were duly elected, yet, there is some difficulty as respects David Farrel; and if they had merely set aside *his* election, we should not have been disposed to interfere. It would appear, that three illegal votes were taken at the election, which being deducted from the highest, which, I believe, is the legislative rule, there was an equality of votes. If this be the case, as regards him there was no

(Right of interested parties to vote.)

election. It is to be regretted, that we cannot set aside the election as respects David Farrel, and order a new one, which might be the means of restoring harmony in the township. As we have no such power, the rule must be made absolute as to David Farrel, and refused as to Messrs. Paisley and McCloskey.

GIBSON, C. J., and HUSTON, J., dissented.

---

The doctrine of the principal case, that no man shall be admitted to vote on the question of the validity of his own election, appears to have been generally received and adopted, almost without qualification. In *Rice v. Foster*, Chief Justice Booth, in the court of errors and appeals of the state of Delaware, went so far as to say, "that an act to make a man a judge in his own cause, would not be valid, because it never was the intention of the constitution to vest such power in the legislature, the exercise of which violates the plainest principles of natural justice." 4 Harrington 485. The legislature of Pennsylvania, as early as 1683, passed an act providing that no member of a court of justice should sit in judgment while his own cause was on trial; and so important was this principle deemed, that it was re-enacted in 1693 and again in 1700. 1 Miller's Laws 13.

It was said in Carson's case, in 1787, that the practice of the general assembly of Pennsylvania had always been, to refuse a member's vote, on the question of his right to a seat. 2 Lloyd's Debates 23; that this was the practice as early as 1689, see 1 Colonial Records 267-8; and see Lancaster Election, 4 Votes of Assembly 125. In Stockton's case, the senate of the United States solemnly decided that a sitting member had no right to vote on the question of his own title to his seat. Cong. Globe 1865-6, page 1635. In Cushing's *Lex Parl. Am.*, §§ 1840-4, there are recorded five cases in which the British House of Commons decided against the right of a member to vote, on a question in which he had a personal interest. And see Gloucester Election, Cush. Elect. Cas. 97.

It would seem, from these authorities, that the interest which will exclude a member from voting, must be one personal to himself, not merely one enjoyed in common with his fellow-citizens (May 353); and that the rule does not extend to preliminary or incidental questions.

(Right of interested parties to vote.)

Thus, in Dechert's case, in the Pennsylvania senate, a special committee having reported that the petition contesting the election of the sitting member was insufficient to put the case upon a trial, he was allowed to vote upon the adoption of the report. January 1871. But this case went to the very verge of the law, if, indeed, it did not overstep the line. Political precedents, in modern times, are of but little authority; the decision of a contested election, in our legislative bodies, has become simply a question of power, not of right.

The only opposing authorities to this well-considered principle of natural equity are to be found in the case of *Commonwealth v. Woelper*, 3 S. & R. 29, where the supreme court of Pennsylvania (Gibson, J., dissenting) decided, that an inspector of elections might be voted for as a candidate; but this was so abhorrent to every feeling of natural justice, that the legislature rendered election officers incompetent by the act of 2d July 1839, § 13. The other is the case of the impeachment of the President, in which senator Wade, the president *pro tempore* of the senate, who would, under the provisions of the constitution, have succeeded to the presidency, in the event of the conviction and removal of the incumbent, was not only allowed to be sworn in as a member of the court, but actually voted for the conviction of the accused, in which he had so deep a personal interest. 2 Johnson's Trial 486-7, 496; 3 Ibid. 360.

## CHASE v. MILLER.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1862.

(REPORTED 41 PENNSYLVANIA STATE REPORTS 403.)

[*Place of voting.*]

The legislature have no power, under the constitution, to authorize electors in the military service, to cast their votes at any place outside the district in which they have a legal residence.

An act of assembly professing to confer such authority, is unconstitutional and void.

Certiorari to the Quarter Sessions of Luzerne county. This was a case of contested election, founded on the complaint of the requisite number of qualified electors, alleging an undue election and false return of Ezra B. Chase to the office of district attorney. Chase received a majority of the votes polled within the county; but Jerome G. Miller received a sufficient number of votes from volunteers in the military service of the United States, if legal, to give him a majority of all the votes polled. The legality of the army vote was the question before the court. The court below (Conyngham, J.) sustained the constitutionality of this vote, and decreed that Jerome G. Miller was duly elected;\* which was assigned for error.

*L. Hakes and S. Woodward*, for appellant.

*S. P. Longstreet and G. M. Wharton*, for appellee.

WOODWARD, J., delivered the opinion of the court. This is a case of contested election; it comes up to us by *certiorari*; a motion was made and fully argued, to quash the

\* The opinion of the court below will be found in 2 Luzerne Leg. Observer 74.

(Place of voting.)

writ, on the ground, that the decree of the court below is final and conclusive, and that we have no jurisdiction to review it. The first point to be considered, therefore, is our jurisdiction; for if there be any doubt on that head, we shall be more than willing to escape the constitutional question upon the record. (The learned judge here entered into an elaborate and exhaustive examination of the question of jurisdiction, which was fully sustained.)

Under the act of assembly above referred to (3d May 1850, *Purd. Dig.* 333) an election for district attorney was held in Luzerne county, last October, at which Ezra B. Chase and Jerome G. Miller were the candidates. After counting what the return judges considered legal votes, they gave their certificate of election to Chase; but twenty qualified electors filed their complaint in writing, setting forth an undue election and false return of Chase, and thus this contest was inaugurated. Besides complaining of a large number of fraudulent votes cast within the county, the petitioners set forth that "on the day of election, certain citizens of the commonwealth, being qualified electors of the county of Luzerne, and then in the actual military service, in certain detachments or companies of volunteers, under a requisition from the president of the United States, and by the authority of the governor of the commonwealth, did, agreeable to law, hold an election for the purpose of electing county officers of Luzerne;" and then followed a detailed statement of the votes cast by different companies for the office of district attorney, and a complaint that the return judges excluded the vote of the volunteers, and issued their certificate in disregard of it.

The petitioners did not give the names of the military voters, nor tell the court where they voted. Exceptions were filed to the complaint, one of which was, that the place of voting was not disclosed; but the court overruled the exceptions, and refused to quash the complaint, or compel it to be amended in this particular. Pending the

(Place of voting.)

proceedings upon this petition, the parties, on the 24th of December 1861, entered into, and with the leave of the court, filed of record, a written agreement, in these words:

“It is agreed, the following facts be submitted, as a case stated, for the court’s decision. Admitted that of the votes polled within the county of Luzerne, Ezra B. Chase received 5811 votes, and that Jerome G. Miller received 5646; and that the said number of votes by each received, be counted by the court as legal votes. That of the votes polled by the volunteers in the army, Ezra B. Chase received 48 votes, Jerome G. Miller received 362 votes; but the legality of the votes polled by the volunteers in the army not being admitted, the question as to the legal effect thereof is submitted as a matter of law for the court. If the court should be of opinion, that the army vote is constitutional and legal, the same to be allowed by the court, and added to the vote cast in the county for the party or parties in whose favor they may be, and then the court to decree in favor of the party having the greatest number of votes. If no part of the army vote is received, the decree to be in favor of Mr. Chase; the army vote being taken as above stated, the objections to it being all waived, except as to its constitutionality.”

On the 6th of January, the court made their decree “upon the written statement of facts agreed to by the parties, and filed upon the 24th December ultimo, no other evidence being offered,” which was to the effect that the army vote was legal, that it should be counted, and that it gave a majority to Miller, to whom the office was awarded.

It has been seen already, that the inability of the court to review a decree of the court of quarter sessions on its merits, springs not from any organic defect of jurisdiction, but from the want of a bill of exceptions to certify us of the facts; but no bill of exceptions is needed when the parties agree upon the facts, and the court make their

(Place of voting.)

agreement a part of the record, and then "thereupon judging," base their decree exclusively on such agreement. A bill of exceptions compels the facts upon the record; neither the court nor the party can resist it; but the parties cannot be compelled to agree, nor the court to admit their agreement to record; still, both may be done, and thus the purpose of a bill of exceptions fully attained. The agreed facts become, in such case, as real a part of the record, as if a special verdict had been received and recorded. The court to whom the legislature committed this contested election, is provided with a jury which might be used to ascertain facts, and a special verdict is as much legal ground for judgment in the quarter sessions as in the common pleas. The parties have come to what is substantially a special verdict, by their agreement, and it is wholly immaterial, that they did not reserve to themselves a right of review, for not waiving it, the law gave them that. Had the court possessed itself of the facts *per testes*, whether in the form of oral evidence, or by depositions, we could not notice them, simply because there is no mode of certifying to us what the facts were; but, placing them upon the record by the concurrent consent of court, counsel and parties, and then basing their decree most distinctly and exclusively upon the facts so ascertained, it would be hypercriticism run mad so to construe the statutes under which we sit, as to deny a citizen the right of review.

If we should limit ourselves strictly to the agreement of 24th December, as the court below did, we should be obliged to say, it was wholly insufficient to support the decree that was built upon it, for it does not tell us that the volunteers, who cast, what it calls, the army vote, were qualified electors of Luzerne county; that they were serving in any detachment or company, in pursuance of public authority; who they were, nor where they voted, whether within ten miles of their usual place of voting, or in Virginia or Kentucky; on all these points the agree-

(Place of voting.)

ment is dumb. And if the parties were able to bring before the return judges no better case than is made by that paper, the judges did well to reject the army vote, and award the certificate according to votes of whose legality they had some evidence.

But to help out the record, we choose to read the agreement in connection with the petition of complaint, and we have already seen, that that did set forth, not as fully as it ought, but with tolerable precision, the qualified character of the volunteers who cast the votes in question. By the expression "army vote," in the agreement, we are then to understand, the votes alluded to in the petition of complaint; this is absolutely necessary to meet the main question of the cause, for there is nothing in the agreement, in and of itself considered, to raise that question, or any other that is worthy of judicial notice.

But even when we construe the agreement by the precedent parts of the record, we cannot learn in what state the votes were cast. The army raised in Pennsylvania has been employed, most of the time, in other states; though camps of instruction have been maintained within our own state. The reasonable presumption is, that the votes denominated the army vote, were cast partly within and partly without our state; and such, we have reason to believe, was the fact. No account whatever was made of the place of voting in the court below.

The "army vote," as it is most loosely called in the agreement of 24th December, was cast somewhere; and counted, in pursuance of section 43d, and the sections immediately succeeding, of the general election law of 2d July 1839. *Purd. Dig.* 379.

The 43d section is in these words: "Whenever any of the citizens of this commonwealth, qualified as hereinbefore provided, shall be in any actual military service, in any detachment of the militia or corps of volunteers, under a requisition from the president of the United States, or by the authority of this commonwealth, on the day of the



(Place of voting.)

general election, such citizens may exercise the right of suffrage, at such place as may be appointed by the commanding officer of the troop or company to which they shall respectively belong, as fully as if they were present at the usual place of election; provided, that no member of any such troop or company shall be permitted to vote at the place so appointed, if, at the time of such election, he shall be within ten miles of the place at which he would be entitled to vote, if not in the service aforesaid."

This section and its sequents are virtually a reprint of the act of 29th March 1813. 6 Smith's Laws 70. The proviso of that act prescribed two miles from his usual place of voting, as the condition on which the volunteer in actual service might exercise suffrage elsewhere. Such a proviso, whether two miles, as in the act of 1813, or ten miles, as in the act of 1839, is an intimation of that which we have other reasons for believing, that the legislature of neither of those years had any thought whatever of legalizing military voting outside of our own territorial limits. They probably meant to give the citizen-soldier, who should be in actual service within the state, on the day of the general election, an opportunity to vote, if his engagements detained him at the prescribed distance from his domicile. And so understood, there was nothing in the state constitution, when the act of 1813 was passed, which its terms could be thought to contravene.

The constitution of 1790 was then in force, and the qualifications of an elector which that instrument prescribed, were that he should be a freeman of the age of twenty-one years, that he should have resided in the state two years next before the election, and within that time paid a state or county tax, which should have been assessed at least six months before the election; or that he should be a son, between twenty-one and twenty-two years of age, of a citizen qualified as aforesaid. This was the constitutional rule, and the whole of it, up to January 1st, 1839, when the amended constitution of 1838 took effect; and

(Place of voting.)

therefore, when the revisers of our civil code, who were very competent constitutional lawyers, reported, in 1834, a general election law, substantially the same that is now in force, they did not hesitate to retain the substance of the act of 1813. Had their report been made after the constitution of 1838, we would scarcely have expected them to incorporate the provisions of the act of 1813, for, as we shall see hereafter, the constitution of 1838 made the precise place of voting an element of the right of suffrage.

For five years their report was not taken up by the legislature, and when, near the close of the long session of 1839, it came up, the legislature passed it pretty much in the words submitted by the revisers, without adverting to the changes which, in that interval of five years, had taken place in our fundamental law. We are not to wonder at this, for instances of even more careless legislation are not uncommon. The act was a long one, made up of 157 sections, was not touched until a late day of the session, and was adopted by the two houses on the 25th June, the very day they adjourned; it was signed by the governor on the 2d July 1839, which gave the act its date. If, in the hurry of closing a long session of the legislature, any one of the numerous provisions of the act suggested a constitutional doubt to the mind of a single member, he doubtless dismissed it upon faith in the revisers, without remembering that he was called upon to consider a very different constitutional question from any that engaged their attention. Tradition tells of no constitutional debates on the act of 1839, in the legislature that passed it. I mention these circumstances, as showing how inconclusive is the argument which the learned judge below attempted to deduce in favor of the constitutionality of the act, from the high character of many of the members of the legislature.

The great question now before us, is, whether the 43d section of the act can be reconciled with the first section of article 3d of the amended constitution? Having

(Place of voting.)

already quoted the 43d section, I will bring into contrast with it, the very terms of the constitutional provision:

"In elections by the citizens, every white freeman of the age of twenty-one years, having resided in this state one year, *and in the election district where he offers to vote, ten days immediately preceding such election*, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector; but a citizen of the United States who had previously been a qualified voter of this state, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes as aforesaid, shall be entitled to vote after residing in the state six months; provided, that white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the state one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes."

By comparing this clause with the corresponding provision of the constitution of 1790, it will be seen in what the amendments consisted. The word "white" was introduced before "freemen," excluding thereby negro suffrage, which had prevailed to a slight extent; the state residence was reduced from two years to one; and the words requiring a residence in the election district where he offers to vote, were added.

The latter amendment was probably suggested by the registry law which was passed in 1836 for the city and county of Philadelphia; the main object of which was, to identify the legal voter, before the election came on, and to compel him to offer his vote in his appropriate ward and township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts. The idea of a registry of legal voters, as a means to purity of elections, was hinted by Ch. J. Tilghman, in 1816, in *Catlin v. Smith*, 2 S. & R. 266 (ante 117). When the third article came up in the convention of 1838, the political party that had

(Place of voting.)

avored the Philadelphia registry law, brought forward and supported this amendment, as calculated to accomplish, substantially, the same results for the whole state, which the registry law proposed to accomplish for Philadelphia. The political party to whom the registry law had always been distasteful, opposed the amendment as an unnecessary clog upon freedom of suffrage, but on a division, it was adopted by a vote of sixty-four to sixty, every member from the city of Philadelphia, where the registry law had proved acceptable, voting for it, and every member from the county of Philadelphia, which had never relished the registry law, voting against the amendment. 9 Debates in Convention 300-20.

Regarding the amendment as designed in general to exclude fraudulent voting, the question now is, what construction shall be given to its particular phraseology? Construing the words according to their plain and literal import (and we must presume that the people of Pennsylvania construed them so, when they adopted the amendment), they mean, undoubtedly, that the citizen, possessing the other requisite qualifications, is to have a ten days' residence in an election district, and is to offer his ballot in that district. The second section of this article requires all popular elections to be by ballot. To "offer to vote" by ballot, is to present one's self, with proper qualifications, at the time and place appointed, and make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts, and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria personâ*, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to

(Place of voting.)

establish his right to vote, if it were challenged, or to challenge, if it were doubtful.

The amendment, so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. Place became an element of suffrage for a twofold purpose; without the district residence, no man shall vote; but having had the district residence, the right it confers is, to vote *in that district*. Such is the voice of the constitution; the test and the rule are equally obligatory; we have no power to dispense with either; whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.

But, be it observed, the constitution does not define an election district; and therefore, I hold, that it referred the definition to the legislature. The words "election district" do not occur in the constitution of 1790; the word "district," was often applied by that instrument to subdivisions of the state for senatorial, representative and judicial purposes, but never for purposes of election. Election districts acquired their first constitutional recognition in 1838; they had, however, long been familiar to our ordinary legislation. "Where any township or townships hath or have been divided, or hereafter shall be divided, in forming any *election district*," an inspector shall be chosen for each district, said the 7th section of the act of 15th February 1799 (3 Smith's Laws 344); and since that time, we have had innumerable acts of assembly creating, dividing and subdividing election districts, until the legislature grew tired of the subject, and in 1854, turned it over to the courts of quarter sessions, to fix election districts, "so as to suit the convenience of the inhabitants thereof." Purd. Dig. 386. Always, from 1799 down to the present hour, election districts, within the meaning of our statutes, have denoted subdivisions of Pennsylvania territory marked out by known boundaries, pre-arranged and declared by public authority. Whether composed, as at different

(Place of voting.)

periods they have been, of counties or cities, of townships or boroughs, of wards or of precincts, they have always been such subdivisions of our own territory, and no man has been known to suggest the formation of an election district, by Pennsylvania authority, outside of her state borders. Now, whilst the constitution did not stop to define election districts, it took up and incorporated them, as the legislature had theretofore, and should thereafter, define and regulate them; it referred itself to the legislative will on the subject; and therefore, election districts mean, in the constitution, just what they mean in the statutes. This necessary dependence of constitutional principles upon auxiliary legislation, was explained in *Commonwealth v. Maxwell*, 27 Penn. St. R. 444.

We must understand the constitution, then, as prescribing to the qualified voter, that his ballot is to be cast in such an election district as the legislature may erect, by itself or through the courts. And the legislative power over election districts is unlimited within our own state. Whether they could form a district *beyond* our territorial jurisdiction, for the convenience of our own citizens, is a question which need not be considered, for no such legislation has been attempted; but it is quite clear to our minds, that the legislature might erect a military camp within the state, into an election district, and the moment they should do so, the constitution would apply itself to that district, in the same manner as to any other.

There must, however, not only be a district to vote in, but there must be a *residence* therein for ten days next preceding the election; this a part of the condition of suffrage. Undoubtedly, the primary signification of the word "residence," as used in the constitution, is the same as domicile—a word which means the place where a man exercises his civil and political rights; but I am not satisfied, that the constitution meant to limit itself to this strict and technical definition of residence. Referring the subject of election districts to the legislature, as we have seen that it

(Place of voting.)

did, I incline strongly to think, that the constitution meant also, to leave the subject of residence in an election district, to legislative discretion, and therefore, that the legislature are as free to declare what shall be residence in an election district for ten days next preceding the election, as they are to prescribe the boundaries of the district. When they have not exercised their power, nor attached to the word any other than its ordinary legal signification, it is to be received, according to its primary meaning in the constitution, as equivalent to domicile; but if they should make a military camp, in Pennsylvania, an election district, and declare that military sojourn and service therein for ten days should be equivalent to a constitutional residence, for the purposes of election, I would be extremely loth to think such a law unconstitutional. These observations, however, on the meaning of the word residence, must not be considered as expressing the opinion of the court, but only my own.

The meaning of the constitutional clause under consideration may, therefore, on the whole, be stated thus: every white freeman, twenty-one years of age, having "resided," according to the primary meaning of that word, or according to legislative definition of it, in any "election district," created by or under the authority of the legislature, for ten days preceding the election, shall be permitted to offer his ballot in that district.

Having now defined, with all possible clearness, the meaning we attach to the clause of the constitution in question, we turn next to the consideration of the meaning of the 43d section of the act of 1839. Like all other parts of a statute, it is to be construed, if possible, in a manner that shall be consistent, not only with the constitution, but with the other parts of the same statute; neither unconstitutionality nor repugnancy are to be assumed, but if both clearly appear, we ought not to be expected to give the section effect.

The section says that the citizens referred to in its first

(Place of voting.)

clause "may exercise the right of suffrage, *at such place* as may be appointed by the commanding officer of the troop or company to which they shall respectively belong." Now, we have seen above that the constitution prescribes a *place* for the exercise of the right of suffrage, to wit, an election district. The 43d section does not affect to create an election district; there is not a word in it for that purpose; there is no designation of boundaries, no subdivision of territory, nothing, not a word or thought which bears the slightest relation to our legislation on the subject of election districts. But it is said, the place which the commanding officer is authorized to appoint, is the substantial equivalent of an election district. Not so, for many reasons; for these two, particularly:

1. There is no prior public designation of the place. One purpose of having election districts designated by some public record is, that all parties interested may know where to resort to find the ballot-box; some go there to vote; others to watch for illegal voters; others to electioneer; but all have an interest in knowing where the law of the land has directed the election to be held. The military commander makes no public proclamation of the place he appoints; no record exists of his appointment.

2. A second and perfectly conclusive reason why the place fixed by the commander cannot be regarded as an election district is, that the legislature have no power to authorize a military commander to make an election district. It is a part of the civil administration—this designating of election districts—and however it may be committed by one of the three co-ordinate departments of the government to another of those departments, as by the legislature to the judiciary, no civil functions of either department can be delegated to a military commander; this would be to confound the first principles of the government.

If the legislature had said, in the most express terms, that the commander might declare his camp, wherever it



(Place of voting.)

might happen to be, an election district, it could have availed nothing; for the constitution, in referring to the legislature for election districts, recognised them as among the *civil* institutions of the state, to be created and controlled exclusively by the civil, as contradistinguished from the military power of the state. The constitution says "the military shall, in all cases and at all times, be in strict subordination to the civil power," which is marking a distinction between the two powers with great emphasis. To the civil, and not to the military power, did the constitution entrust the formation of election districts, and therefore, the civil cannot commit it to the military.

If then, the legislature did not, and could not, authorize the military commander to form an election district, how could there be any constitutional voting under the 43d section? Without an election district, there can be no constitutional voting; the 43d section provides for no election district, and no military commander can be empowered to form one; hence, it follows, as an inevitable deduction, that the "place" referred to in that section is inconsistent with the constitutional requisition of an election district, and that whatever votes have been cast, in pursuance of that section, since the constitution of 1838 came in, have been cast without authority of law. If the place of voting has been, as in many instances we know it has been, in other states and in the District of Columbia, the assumptions set up in behalf of it have only been the more extravagant. For, observe, it has been first assumed that the constitution was intended to have extra-territorial effect; next, that the legislature had power to make election laws, to be executed not only in Pennsylvania, but in other states; then, that the 43d section established election districts wherever a commander of a troop or company should be pleased to appoint; and finally, that the presence of the soldier-voter at that place (though it might be on a forced march, or in the tug of battle), was *residence* for ten days, within the meaning of the constitution; no

(Place of voting.)

word of legislation having ever said it should be so considered. Nay, not only has no legislation authorized this last assumption, but this very 43d section has excluded it, by declaring that the soldiers entitled to vote at the places appointed by military commanders should be "qualified citizens." A constitutional argument which rests on such assumptions can never be formidable.

When a soldier returns to his election district, he resumes all the civil rights of citizenship, and his residence being unimpaired by his temporary absence, he has a right to vote on election day; but under the constitution, to which his fealty is due, he can acquire no right to vote elsewhere, except by a change of residence from one district to another.

The repugnancy of the 43d section to other sections of the same statute, is as gross as its inconsistency with the constitution. It says, the "citizens of this commonwealth qualified as *hereinbefore* provided," shall have the peculiar right of suffrage, which is claimed in this case to be constitutional. This word "*hereinbefore*" is a reference to prior sections of the same statute; but the qualifications for suffrage are not contained in any prior section; another instance of careless legislation. It is not till we get to the 63d section that we come to the subject of qualifications; the 63d section re-enacts the first section of the third article of the constitution in terms. If we read the word "*hereinbefore*," as if it were written "*hereinafter*," or if we construe it as referring to the constitutional clause of qualification (and in one or the other of these ways it must be taken), it comes to the same thing—a demand for the constitutional qualifications of suffrage in every soldier who claims to vote under the 43d section. It says, in effect, that the soldiers who offer to vote in the election district wherein they have resided ten days immediately preceding the election, shall be entitled to vote in any place their commander appoints, provided it be not within ten miles of the district wherein they have resided for the last ten

(Place of voting.)

days; which is downright nonsense. Yet such is the effect of the words "qualified as hereinbefore provided," when taken in connection with the other parts of the section; they turn the whole section into jargon.

The 63d section declares, that "no person shall be permitted to vote at any election" provided for by the act, except he possess the constitutional qualifications which have been already expounded. The 67th section declares that every person qualified as aforesaid "shall be admitted to vote in the township, ward or district in which he shall reside;" and the resolution of 26th April 1844, provides for a person who removes from one ward, borough or township to another, within ten days before the election, and gives him a right to vote in the ward, borough or township from which he has removed.\* These legislative regulations of residence in districts, are in accordance with that interpretation of the constitution suggested above, and show clearly how essentially the *place of voting* has entered into the qualifications of suffrage. The negative words of the 63d, and the affirmative words of the 67th, are very emphatic expressions of the constitutional rule in respect to the place of voting.

Whilst speaking of the legislative control of election districts, it may be proper to advert to a fact stated in argument, that voters resident in the township of Wilkesbarre, which is an election district, are accustomed to vote in the borough of Wilkesbarre, which is a separate election district, and other similar instances are said to exist in Luzerne county, where votes are actually cast in an election district adjacent to that in which the electors reside. If this practice have the sanction of an act of assembly, it is defensible;† if it have not, I know of no

\* This resolution of 26th April 1844 was declared unconstitutional in *Thompson v. Ewing*, 1 Brewst. 103. And see *McDaniels' Case*, 3 Penn. L. J. 314 (post 238).

† *Sed quere?* It would seem, that such an act would be unconstitutional.

(Place of voting.)

principle on which it can be excused, except that of *communis error*. And this is all that we feel called on to say in regard to it, for it is not a circumstance of sufficient magnitude or importance to disturb the course of our argument, or to attract further notice.

To all these sections, the 43d, as construed in the court below, is directly repugnant. It is repugnant also to all those numerous provisions of the act which require peace officers, on demand of an election officer, or of three citizens, to preserve free access to the polls, and to suppress disturbances and riot; which forbid wagering and misconduct at the polls, and which prohibit all troops, "either armed or unarmed," from attending at any place of election within the commonwealth. The 43d section is in direct antagonism to all of these reasonable and conservative provisions. It permits the ballot-box, according to the court below, to be opened anywhere, within or without our state, with no other guards than such as commanding officers, who may not themselves be voters, nor subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.

It is scarcely possible to conceive of any provision and practice that could, at so many points, offend the cherished policy of Pennsylvania in respect to suffrage. Our constitution and laws treat the elective franchise as a sacred trust, committed only to that portion of the citizens who come up to the prescribed standards of qualification, and to be exercised by them at the time and place, and in the manner, pre-arranged by public law and proclamations; and whilst being so exercised, to be guarded, down to the instant of its final consummation, by magistrates and constables, and by oaths and penalties; all of which the 43d section reverses and disregards, and opens a wide door for

(Place of voting.)

most odious frauds, some of which have come under our judicial cognisance.

It is due to our citizen-soldiery to add, however, in respect to the cases of fraud that have been before us, that no soldier was implicated. The frauds were perpetrated, in every instance, by political speculators, who prowled about the military camps, watching for opportunities to destroy true ballots and substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law. And this is the great vice of the 43d section; that it creates the occasion and furnishes the opportunity for such abominable practices. This would be a reason, drawn from our experience of the last half year, for construing it strictly, if strict construction were required. But it is so palpably in conflict with the constitution, and so repugnant to all the substantial parts of the enactment into which it was heedlessly thrust, that no strictness of construction is called for. Taking the section as it stands (as every reader, whether clerk or layman, would understand it, or as the learned judge below administered it), we hold it to be subversive of the amended clause of article 3d of the constitution, and also of the constitutional sections of the general election law of 2d July 1839.

Having now examined fully the grounds and extent of our jurisdiction, and having stated the meaning of both the constitutional amendment and the enactment in question, and thus developed the irreconcilable antagonism between them, it remains only that we notice briefly some of the most prominent arguments that have been urged in support of the enactment. The learned judge refers himself to several cases, in which this court have set up judicial implications as to the spirit and meaning of the constitution, in order to support acts of assembly that were inconsistent with the letter of the constitution; but he failed to observe that, in all these cases, there was ground laid in the constitution itself, to support the judicial im-

(Place of voting.)

plication. Take, for example, the acts of assembly that were discussed in Zephon's Case, 8 W. & S. 382; Kilpatrick's Case, 31 Penn. St. R. 198; and Foust's Case, 33 Ibid. 338; all of which were supposed to conflict with that provision of the constitution which requires the president judge of the common pleas to be one of the quorum of the court of oyer and terminer. Everybody knows that the constitution betrayed an anxiety that the trial of high crimes should be presided over by a judge "learned in the law," and as it provided for no such judges, except in the instance of the president of the common pleas, it, therefore, required *him* to be present in the court of highest criminal jurisdiction. But when the legislature provided associate judges "learned in the law," for certain courts of common pleas, everybody saw how the overruling purpose of the constitution would be just as well carried out, by allowing such associates to constitute the oyer and terminer, as by requiring the president judge to be always present. Founding the judicial implication on the manifest intent and purpose of the constitution, the acts of assembly were held constitutional.

So, in the instance discussed in *Commonwealth v. Maxwell*, 27 Penn. St. R. 444, the choice of judges by popular election was seen to be the policy and purpose of the constitution; but the constitution could not regulate the details of such an election, and therefore referred them to the legislature to regulate. The legislature, considering that three months was none too much time for the people to look up a good judge, provided that if a vacancy occurred in less than that time before the annual general election, the choice should be postponed till the general election of the next year; the vacancy being filled, meantime, by executive appointment. We held the act of assembly constitutional, because it aimed at the accomplishment of one of the great and apparent purposes of the constitution. We would not consider the interval of three months unreasonable, because it was the very period which the constitution

(Place of voting.)

itself fixed for the election of a governor when a vacancy happened in that office in the midst of an official term. Thus the grounds of the judicial implication set up in support of the law were derived from the constitution itself. The same line of remark might be applied to most, perhaps all, of the other cases cited.

But how can it be applied to this case? In what part of the constitution does it betray the purpose, policy or desire that votes should be cast wherever qualified citizens may happen to be on election day? So far from affording any ground for judicial implications of this kind, it studiously excludes them, by prescribing the terms of suffrage with as much precision as we would look for in a treatise on mathematics. It does not deal with suffrage carelessly; it withholds it altogether from about four-fifths of the population, however much property they may have to be taxed, or however competent, in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject. Penn's frame of government, made in April 1682, gave the right of suffrage to "every freeman of the province;" his laws agreed upon in England, in May 1682, gave it to every inhabitant of the province who should purchase a hundred acres of land, or who shall have paid his passage, and taken up a hundred acres of land at a penny an acre, and cultivated ten acres thereof; and to every person that hath been a servant or bondsman, and is free by his service, that shall have taken up fifty acres, and cultivated twenty; and to every resident of the province that pays scot and lot to the government. By the constitution of 1776, every freeman of 21 years of age, having resided in the state one year next before the election, and paid public taxes during that time, was entitled to vote; here we see the definition of a voter growing more exact; and in the constitution of 1790, still more exact; and finally, in that of 1838, there is superadded to

(Place of voting.)

the other distinguishing marks, a district residence of ten days immediately preceding the election.

Now, the labor of the constitution has not been to restrict suffrage in any spirit of distrust of popular intelligence, but it has been to define it so exactly that it might be preserved from abuse and perversion. The constitution affords ample ground for judicial implications in favor of legislation that tends to ascertain legal voters and votes with precision and exactitude, but not an atom of ground for implications in behalf of a law that opens the ballot-box anywhere and everywhere, under supervision of military officers unknown to our civil administration, and where no officer can possibly be who is specially charged with the supervision of state elections. Because judicial implications have been set up in behalf of other acts of assembly, it does not follow that judicial implications can save this one. In other instances, the implication was well grounded in the constitution; in this instance, everything in the constitution forbids the implication.

The learned judge deprecates a construction that shall *disfranchise* our volunteer soldiers. It strikes us that this is an inaccurate use of language; the constitution would disfranchise no qualified voter; but to secure purity of elections, it would have its voters in the place where they are best known on election day. If a voter voluntarily stays at home, or goes a journey, or joins the army of his country, can it be said, the constitution has disfranchised him? Four of the judges of this court, living in other parts of the state, find themselves, on the day of every presidential election, in the city of Pittsburgh, where their official duties take them, and where they are not permitted to vote. Have they a right to charge the constitution with disfranchising them? Is not the truth rather this—that they have voluntarily assumed duties that are inconsistent with the right of suffrage for the time being? Such is our case; and such is the case of



(Place of voting.)

the volunteers in the army; the right of suffrage is carefully preserved for both them and us, to be enjoyed when we return to the places which the constitution has appointed for its exercise. It is forcing a gratuitous assumption upon the constitution, to treat it as intending that the volunteer in the public service, shall carry his elective franchise with him, wherever his duties require him to go; there is no word or syllable in the instrument to justify the assumption.

A good deal has been said about the hardship of depriving so meritorious a class of voters as our volunteer soldiers of the right of voting. As a court of justice, we cannot feel the force of any such consideration; our business is to expound the constitution and laws of the country as we find them written; we have no bounties to grant to soldiers, or anybody else. It may be said, however, in answer to this suggestion, that the hardship of missing an annual election, is one of the least the soldier is called on to endure, and this they share in common with the patriot soldiers of all the loyal states, for it is understood that no state but Pennsylvania has attempted to extend civil suffrage to an army in the field. To voluntarily surrender the comforts of home and friends and business, and to encounter the privations of the camp and the perils of war, for the purpose of vindicating the constitution and laws of the country, is indeed a signal sacrifice to make for the public good; but the men who make it most cheerfully and from the highest motives, would be the very last to insist on carrying with them the right of civil suffrage, especially when they see, what experience proves, that it cannot be exercised amidst the tumults of war, without being attended with fraudulent practices that endanger the very *existence* of the right. Whilst such men fight for the constitution, they do not expect judges to sap and mine it by judicial constructions.

Finally, let it be said, that we do not look upon the construction we have given the constitutional amendment,

(Place of voting.)

as stringent, harsh or technical; on the contrary, we consider it the natural and obvious reading of the instrument, such as the million would instinctively adopt. Constitutions, above all other documents, are to be read as they are written; judicial glosses and refinements are misplaced when laid upon them. Carefully considered judicial implications may, indeed, be made upon them, in support of statutes (never to defeat statutes), when such implications are grounded in the constitution itself, and tend to accomplish its obvious purposes, as well as to promote the public welfare. But when asked to set up a construction that opposes itself both to the letter and the spirit of the instrument, and which tends to the destruction of one of our fundamental political rights—that free and honest suffrage on which all our institutions are built—this court must say, in fidelity to the oath we swore, that it cannot be done.

Decree reversed.

THOMPSON, J., dissented.

---

The doctrine of *Chase v. Miller*, was followed in the court of quarter sessions of Philadelphia, in the case of *Thompson v. Ewing*, 1 Brewst. 67, 104. But the law was altered in Pennsylvania, by an amendment to the constitution, procured by the dominant political party, in 1864, which again opened wide the door for all the evils so clearly pointed out by the supreme court in the principal case. In *Hulseman v. Rems*, 41 Penn. St. R. 396, there was an application to the supreme court for an injunction to restrain the counting of certain returns of alleged military votes, which were shown to be barefaced forgeries, without any pretext of legality; and whilst the court were compelled reluctantly to refuse the application, it called forth from Chief Justice Lowrie these sorrowing words: "If, in this way, we suffer a gross fraud to pass through our hands without remedy, it is not because we have any mercy for the fraud, but because we cannot frustrate it by any device of ours, without an act of usurpation. Another tribunal is appointed to administer the remedy, and we believe that, on proper application, it will

(Place of voting.)

administer it rightly, according to the evidence it may have ; and if we had doubts of this, we should still not be justified in interfering. Sad indeed, very sad, has been our recent experience of election frauds ; but we cannot believe that our partisanship has become so reckless, and our elective franchise so carelessly exercised, and our thirst for office and power so intensely selfish, that any official body will sanction so base and frightful a fraud upon the public as this now appears, or that any man deemed worthy of an office would accept it under such circumstances." *Thompson v. Ewing*, 1 Brewst. 67, was another case in which certain forged military election returns (commonly known as the "Schimpfller fraud") were attempted to be set up, for the purpose of defeating the will of the people as expressed at the polls. *Weaver v. Given*, 1 Brewst. 140, also exhibited a case of forged military returns, from a regiment stationed in Louisiana, in which no election whatever had been held. And the experience of the courts fully justified the remarks of the supreme court in *Chase v. Miller*.

In California, under a somewhat similar clause in the constitution, requiring a district residence, the supreme court fully adopted the reasoning of the Pennsylvania court in *Chase v. Miller*, and decided, in a lengthy argument, by Judge Shafter, that an act which provided for taking the votes of the electors in the military service, outside of the respective counties of their legal residence, was unconstitutional and void. *Bourland v. Hildreth*, 26 Cal. 161. In Connecticut, the judiciary came to the same conclusion ; *Opinion of the Judges*, 30 Conn. 591 : and in New Hampshire also ; *Opinion of Justices*, 44 N. H. 633.

In Ohio, however, a similar statute was held not to be so clearly in conflict with the provisions of the constitution, as to justify the court in declaring it unconstitutional. *Lehman v. McBride*, 15 Ohio St. R. 573. And in Iowa, the supreme court, whilst acknowledging the force of the reasoning of Judge Woodward, in *Chase v. Miller*, decided that such legislation was valid, on the ground that their constitution did not require a district residence. *Morrison v. Springer*, 15 Iowa 304. And see *Chandler v. Main*, 16 Wis. 343.

## McDANIELS' CASE.

In the Court of Quarter Sessions of Philadelphia.

MARCH SESSIONS 1844.

(REPORTED 3 PENNSYLVANIA LAW JOURNAL 310.)

[*Election districts.*]

An election district is any part of a city or county, having fixed boundaries, within which the citizens residing therein must vote ; as, for example, a ward in the city of Philadelphia.

To constitute a change of residence from one election district to another, there must be an actual removal.

To reject an illegal vote, it must appear for whom it was polled ; it cannot be taken from the majority candidate, unless proved to have been polled for him.

This was a petition contesting the election of the assessor of the Sixth ward of the Northern Liberties ; the grounds of contest are fully stated in the opinion of the court.

*Goodman*, for complainants.

*H. M. Phillips*, for respondent.

PARSONS, J., delivered the opinion of the court. This case arises on a petition presented by the requisite number of electors of the Sixth ward of the Northern Liberties, asking us to set aside the election for assessor, held on the 15th of March last, upon the ground that the officers conducting said election rejected the vote of one Charles Thomson, who, it is alleged, was a qualified voter of said ward. It appears from the petition and return, that William Jacobs received 313 votes for the office of assessor, and that William McDaniels received 312 votes for the same office ; and it is contended, and, in fact,

(Election districts.)

proved, that Thomson, a man who claimed to be an elector, offered his vote for McDaniels and it was rejected; hence, it is asserted by the complainants, had this vote been received, the votes would have been even, therefore, there was no election by the people. The decision of the case mainly turns upon the question, whether Charles Thomson had a legal right to vote in the Sixth ward, from whence this complaint is made. It is clear, from the evidence, that Mr. Thomson had been an inhabitant of this ward, for at least twenty years past, that he owned real estate there, and had paid a county or state tax within the last year; but it is now contended that, about three days before the election, he had removed into Penn township, and therefore, had lost the right of voting in the Sixth ward.

In the discussion of this case, various questions of law have been raised by counsel, which are deemed of some importance; these we will first dispose of. It is contended, that admitting Thomson removed out of the ward three days before the election, as he had not resided in another for ten days prior to the day when the votes were to be cast for township officers, and obtained no residence therein, he had still a right to vote in the ward where he had last resided, at any election, until he acquired his right to vote by a ten days' residence; that the right of suffrage is not to be lost by a mere change of residence; that the elective franchise, once acquired, is not taken away by a simple removal from one township to another, till a place of residence has been obtained which gives him the enjoyment of this invaluable right to the citizen; while on the other side it is contended, that each county is an election district, and the removal from one ward or township to another, gives to the elector a right to vote wherever his residence is, although he has not been within the same ten days.

A correct solution of these questions depends principally upon a construction of the first section of the third article

(Election districts.)

of the constitution, and the 63d section of the act of 2d July 1839, passed immediately after the adoption of the constitution and based upon it. That part of the constitution referred to is in these words: "in elections by the citizens, every white freeman of the age of twenty-one years, having resided in this state one year, and in the election district where he offers to vote, ten days immediately preceding such election, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector." The 63d section of the act of 1839 is as follows: "no person shall be permitted to vote at any election as aforesaid, other than a white freeman of the age of twenty-one years or more, who shall have resided in this state at least one year, and in the election district where he offers to vote, at least ten days immediately preceding such election, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election."

The term "election district," as employed in the constitution and the act above quoted, may be defined to be, any part of a city or county, where its boundaries are fixed by law, either by legislative enactment, or by the adjudication of a court, or other authority to whom this power is delegated, where the citizens, within the boundaries thus established, assemble to vote for public officers, whether their authority is local, or they are to act in governing the affairs of the state or nation. This construction of the law, I think, is fully sustained by a reference to various acts of assembly which were in force when the new constitution was adopted, and which have since been passed.

The act of the 15th of April 1834, relating to townships and township officers, provides that each township in the state may sue and be sued by its known and designated name; it also gives authority to the citizens within the boundaries thereof, annually to elect one assessor, a con-

(Election districts.)

stable and other officers that are mentioned in the act, who are to perform certain duties relating to the good government of the township. Other acts of assembly authorize every borough to elect an assessor, divide boroughs into different wards for that purpose, and give the citizens power to elect numerous officers for a proper regulation of their municipal affairs; others give authority to the electors of the various wards in cities to elect assessors, constables, &c., where the territory embraced within such wards has been designated by law. Hence, we decide that these are "election districts;" and it was in reference to such legally-constituted parts of counties or cities, that it was intended those words should apply; it is an expression in common use, and perfectly understood by the people, as denoting any such portion of territory, whether coming under the name of township, borough, ward or district; nor was it intended by the law-making power, to have a more extended application, as I think is manifest from other parts of the act of the 2d of July 1839.

The 51st section of that act provides, that "the election for assessors in the several townships, wards and *districts* in this commonwealth, shall be conducted under the same regulations as are hereinbefore provided." In this section the term "district" is used; so also in other sections of the same act which will soon be mentioned, and that, in connection with wards and townships, and not designed to have a more extended signification—not intended to embrace a whole city and county. And a residence of ten days was not to be in *any* part of a city or county, but must be in some "election district," where the citizens had a right to assemble and vote for public officers, and where none could vote but those who had been domiciled within those designated boundaries, for at least ten days immediately preceding the time of holding an election.

Other sections of the act contain almost the same expressions, and denote a similar application, and at all times appear to have relation to election purposes. The

(Election districts.)

3d section provides, that the qualified citizens of the several wards, districts and townships shall meet, in every year, at the time and place of holding the election for constable of such ward, district or township, and then and there elect, as hereinafter provided, two inspectors and one judge of elections. The 6th section declares, that the judges of the election, within the limits of their respective wards, districts or townships, shall have power, and are hereby required to decide on the qualification of any person claiming to vote at an election, &c. The 7th section of the same law provides, that when any township has been or shall be divided in forming an election district, the qualified citizens of each part of such divided township shall severally elect, in the manner, and at the time and place aforesaid, two inspectors for each of said several election districts, and shall also elect one person to serve as judge of elections in each district, to perform the duties enjoined by the 6th section of the act.

I am aware that a city or county is authorized by law to elect one or more representatives to the state legislature, a senator or a member of congress; and in some statutes, this is called an election district. It is an election district for that special purpose, but it would be more proper to call it a representative, senatorial or congressional district, and in common conversation, it is generally so denominated; it cannot be said, with any propriety, that it is such an *election district* as is referred to in the constitution. Would any one seriously contend, that an elector could vote in any part of the county, by reason of his residence in it, simply because it was entitled, under the enumeration of its inhabitants, to elect two members of assembly and a member of congress? If so, then we may call the whole state an election district for the election of a governor (and a man could vote in any part of the commonwealth), with the same propriety, that a city or county is to be denominated an election district, under the constitution or the act of 1839.

•



(Election districts.)

If we have given a correct definition of the term "election district," then it is clear, that no citizen has a right to vote at any election, unless he has resided in the ward, township or district where he offers his vote, at least ten days preceding such election; and it is equally clear, that he must vote in the ward, township or place where he resides at the time the election is held.\* If he has lost his residence in a ward, township or district, by a removal, although he has not obtained another, still he cannot return to his last place of inhabitancy, and claim the right of voting, because the law and the constitution require that he shall vote in the election district where he shall have resided ten days immediately preceding the election; and the loss of three days' residence is as effective, as to his legal rights, as three hundred. There can be but one place of domicil, which is instantaneously acquired, and when once attained, all others are terminated; nor can any vestige of the last residence be retained for election purposes.

It has been strenuously contended, that no citizen is to be disfranchised, that the right of an elector, so dear, is not to be taken away by a mere change of residence from one side of a street to another. Perhaps, it is a sufficient reply to this argument, to say, that the constitution gives this right to an elector, on three conditions: one is, that he shall have resided in the state one year; the second, ten days in the election district where he offers his vote, immediately preceding the election; and the third, that he has paid a state or county tax within two years. Now, if a citizen violate either of these conditions, his right to vote at that election is taken away by his own act: man is a free agent for most purposes; if, therefore, he should choose not to pay a tax for two years, and deprive himself of the elective franchise, can he censure any one but himself? If it suit the convenience of an elector, or he find it for his interest, to remove from one ward to another, less than ten days previously to an election, and

\* See *Commonwealth v. Kuntzman*, 41 Penn. St. R. 429.

(Election districts.)

thereby deprive himself of a vote, can he complain of injustice, if his vote be refused in the district he has just left, and in the one to which he has removed, but where he has not had a residence of ten days? surely not; he violates one of the conditions of the constitution, to which he has subscribed, that gave him the original right.\*

This the court believe to be the law, and a proper construction to be put upon it, for the purpose of preventing any avenue to fraud or imposition being opened, and most clearly we should be doing violence to the constitution and the law, to give any other opinion. The language is clear and unambiguous, and in our opinion, admits of no other fair interpretation; it has been framed in wisdom, nor would we change its provisions if we had the power to do so. The elector has all the privileges which any reasonable being could ask; he may remove within the ten days before an election, and lose his right to give a vote, if he please—if the advancement of his interest or convenience be more dear to him than the right of voting for public officers. Any other decision might open wide the gate for illegal voting, which would sully the purity of the ballot-box; the people have endeavored, by clear statutory provisions, to protect it from fraud or dishonor, and covered it with a protecting shield, and we are not disposed to suffer its sanctity to be invaded. On the contrary, we will give every fair interpretation to the law, which is calculated to guard it with firmer bars and stronger locks, if possible; public justice demands this, from those entrusted with the administration of the law.

The next inquiry is, had Thomson lost his residence in the Sixth ward, before the day of election? It is clear, that down to the 11th of March last, he resided in the Sixth ward; that for a few days before, he had been removing his effects into Penn township; he testified, that his family slept, for the last time, in the house he had occupied in the Sixth ward, on Monday night, the 11th;

\* See *State v. Adams*, 2 Stew. 239.

(Election districts.)

on the 12th, he gave the key of the house to the owner (although he was compelled to pay rent to the 5th of April); and the election was held on Friday the 15th of March. He further testified, that he owned a mill in the Sixth ward, and carried on his business therein as a manufacturer of plaster; that from the 11th until after the 15th, his family slept in Penn township; that neither himself nor family slept at the house he had occupied in the Sixth ward, after the 11th; that on the night of the 12th, he lodged with his family in Penn township. On Wednesday night, he said, he was at work in his mill in the Sixth ward; on Thursday, he was at the mill, and part of the time asleep, and staid at his mill for the purpose of attending to his business, and did not stay for any other purpose; was often up all night, as it was too far from his residence to go from one place to another, without interfering with his work. He also testified, that from the 11th to the 15th of March, he took his meals at different places, sometimes at his own house in Penn township, at others, in the Sixth ward, and sometimes in the Fifth ward; and the reason he assigned for taking his meals away from his own house, was, in consequence of the distance; that it was too far to go home from the mill; that his wife and children lived and slept entirely in Penn township; he said, he had always lived with them, unless separated to attend to his business. From the testimony of Thomson himself, it is manifest, that he had lost his residence in the Sixth ward of the Northern Liberties, before the 15th of March, the day of election. It is equally clear, that for all legal purposes, he had gained a residence, was domiciled in Penn township, on the 12th of March, three days before the election; he was as much an inhabitant of Penn township after the 12th of March, as if he had lived there for three years, for all but election purposes.

No principle is better settled, than that residence is a question of intention. It was decided by this court, in the case of James Casey, an insolvent debtor, that in

(Election districts.)

cases involving the question of residence, the inquiry is, the mind with which a party moves to or from a state. 1 Ash. 126. The determination of this question depends entirely upon the fact, whether the individual has gained or lost a residence. There must be an actual removal to lose a residence; a mere intention to remove, not consummated, can neither forfeit the party's old residence, nor enable him to acquire a new one; the intention must be followed by an actual removal. Hence, if there be an intention to remove, for the purpose of acquiring a new domicile, and an actual removal, with a design of effectuating that intent, then the old residence is lost and a new one is acquired; and such I conceive to be the case before us.

Thomson began to remove his effects to Penn township, before the 11th; on the morning of the 12th of March, he continued that removal; and on the evening of the 12th, we find him in Penn township, with his family, where he lodged with them, and where his wife and children have continued to reside ever since; this was three days before the election. His residence in the Sixth ward was as completely lost, on the day of the election, as though he had been absent for a year; true it is, he had not obtained the right of voting in another place, because he had not been in Penn township ten days; but whose fault was it that he lost his vote? It was his own. If he wished to continue to enjoy the privilege of an elector, he should have removed ten days before the election, or delayed the act until after the 15th of March; it was a right which he was at liberty to surrender, if he chose. His domicile was fixed in Penn township; the evidence is, that it was his intention to remove from the Sixth ward; that intention was effectuated by an absolute removal on the 12th, and for all legal purposes was complete and perfect. He could have but one domicile; his residence could be in but one place; and his residence in the Sixth ward was as completely ended, when he left that ward on the 12th of March, as if he had removed across the river to Camden.

(Election districts.)

Suppose Thomson had started, with his family and effects, for New York, in the train of cars, on the morning of the 12th of March, had arrived there the same evening, put his family into a house and continued with them during the night, and come back here on the 15th, the day of the election, I apprehend that no one would seriously contend that he could legally have given his vote. During the interval, his property in the Sixth ward would have been liable to a foreign attachment for his debts, if he had any; and why? because he was the inhabitant of another state; he was domiciled there; his intention to leave the state had been effectuated by an actual removal. The case of *Lyle v. Foreman*, 1 Dall. 480, is full on this point; *United States v. The Penelope*, 2 Pet. Ad. 450, contains the same principle.

In deciding the question of domicil, as to an elector's removing from one part of the state to another, or from one township to another, these rules are applicable. The framers of the constitution, in 1838, and the legislature, when passing the act of 1839, were perfectly aware that the question of residence was fixed by repeated decisions in this country and in England, and they intended that the elector should have a fixed, certain abode in a district, township or ward for ten days; and that he should be permitted to vote where he then actually resided, and nowhere else. In our opinion, the residence of Charles Thomson was in Penn township when this election was held; he had no legal right to vote in the Sixth ward of the Northern Liberties, on the 15th of March last; and the officers of the election performed their duty correctly, when they rejected his vote.

Another ground presented for setting aside this election is, that one William McDonald was permitted to vote, who, it is alleged, was an illegal voter. It appears from his deposition, that he was born in this state; that he had been a sailor for twenty years; that he entered the service of the United States, went to the Mediterranean,

(Election districts.)

and landed from the ship Preble, in Boston, the latter part of August last; that he had been absent ten years and nine months, and had a wife and children residing in the Sixth ward of the Northern Liberties. He said, he had paid no tax but an hospital tax of twenty cents per month, retained out of his wages by the government; and on that evidence, he was permitted to vote; he said, that he voted five tickets, but whom he voted for, for assessor, he did not know, but that he voted the ticket headed by John Apple for alderman; that it was called the "Apple ticket."

It is conceded, that this was an illegal vote, and that the officers of the election had no right to receive it; and as an illegal vote was polled, we are asked to take it from the majority, according to a rule which, it is said, has been acted upon by committees of the legislature. I think it would be difficult to produce any case where a committee, in deciding upon a contested election, have taken the illegal votes from him who had the majority, if it would change the result of the election (unless those votes had been cast for him), and given the office to the minority candidate. Whatever may have been the practice of committees of that body, I will not pretend to say; but we are called upon to lay down a rule of law for ourselves, and this we think is a correct one; that if a man have given a vote who did not possess the legal qualifications of a voter, he is bound to disclose, on oath, for whom he voted, or that fact may be established by any other legal proof, and when it is ascertained for whom he voted, that vote must be taken from the candidate for whom it was given. I know it is said, you cannot compel an elector to disclose for whom he voted; but this does not apply to one who is not an elector. When once the fact is made clear, that an individual has been suffered to vote, who had no legal right to vote, the veil of secrecy does not protect him, because he is not an elector—he is a stranger, an intruder, and therefore, is entitled to none of the privileges which

(Election districts.)

appertain to legal voters; hence, he may be compelled to testify.

But if the individual do not know for whom he voted, and the fact cannot be established by other evidence, then the complaint must fail for want of proof, like any other cause which is lost for want of sufficient evidence to sustain it; for, it is difficult to see, upon what principle of justice, we should take this vote from Jacobs, who has but one majority, thereby change the result, thwart the will of the people, and give the appointment of assessor to the county commissioners, when it is quite as probable the vote was given for McDaniels. Perhaps, committees of the legislature, in deciding upon contested elections, have taken illegal votes which had been polled, from the candidate who had the majority, even where it would change the result, when it was not disclosed for which candidate they were cast;\* but, I think, in every such case, it will be found, that a new election was ordered and the matter referred back to the people. But according to a late decision of the supreme court, the court of quarter sessions, in judging of the validity of a township election, have not the power to order another, and therefore, cannot exercise that discretion which is used by committees of the legislature; and a rule which influences a tribunal clothed with great discretionary powers, might be a very unsafe and unjust one to be adopted by those who must decide upon principles more confined and restricted, and who cannot give to the people the opportunity of correcting an error into which their officers may have fallen. Hence, we are led to believe, the rule above stated is better calculated to do justice to the candidates and electors, than any other we can take for our guide.

No election should be set aside on slight or trivial grounds, where the will of the people has been fairly and legitimately expressed, nor without clear and satisfactory proof of illegality or impropriety. When once it is

\* See Commonwealth v. McCloskey, ante 211.

(Election districts.)

proved that any candidate has received the vote of one who had no right to give it, we will take it from him, no matter what may be the effect; but we think it unjust to deprive him of his election, when, in all human probability, the illegal vote was cast for his opponent, who is in the minority. It would be unjust to adopt a principle which, in its application, might produce such a result. McDonald testified that he did not know for whom he voted as assessor; but if we were to weigh the evidence and take circumstances for our guide, the inference might be fairly drawn, that he voted for McDaniels. It was admitted by counsel in the argument, that he ran on the "Apple ticket;" the witness said he voted five tickets, that they were given to him in a bundle, that he could not read or write, but that he asked for a ticket headed by John Apple for alderman, and they gave him one. From the zeal with which closely-contested elections are generally conducted in this state, and the nice manner in which entire tickets are arranged, it would not be a strained inference to presume that the witness voted for McDaniels. If so, then it should be taken from his votes, and that would increase the majority for the candidate who has the return.

We do not, however, place our decision upon that ground, but upon the rules of law which we have already laid down. We are of opinion, from the evidence before us, that the candidate who has the return was duly elected assessor of the Sixth ward, and therefore, order this complaint to be dismissed, and the election of Jacobs confirmed; we likewise order and direct that the county pay the costs of these proceedings.

---

McDaniels' case is a leading one upon the several points decided, all of which are fully sustained by subsequent decisions, and may be accepted as the undoubted law upon the questions involved. In *Chase v. Miller*, 41 Penn. St. R. 420, it was said by the supreme court, that "from 1799 down to the present hour, election districts, within the meaning of



(Place of holding elections.)

our statutes, have denoted subdivisions of Pennsylvania territory, marked out by known boundaries, pre-arranged and declared by public authority'' (ante 223). 'On the 26th April 1844, the legislature attempted to overrule the decision in McDaniels' case, by providing that any qualified elector who might have removed from one election district to another, in the same county, within ten days preceding any general election, should be entitled to vote in the district from which he had so removed; but this was declared to be unconstitutional, in *Thompson v. Ewing*, 1 Brewst. 68, 103.

---

## CHADWICK v. MELVIN.

In the Supreme Court of Pennsylvania.

MARCH TERM 1871.

(UNREPORTED.)

[*Place of holding elections.*]

If an election be held, without necessity, at a different place from that designated by law, the entire poll must be rejected.

And so also, it seems, if the polls be opened at a much later hour than the time prescribed by law.

Certiorari to the court of Quarter Sessions of McKean county. This was a petition contesting the election of Charles C. Melvin to the office of treasurer of McKean county, at a general election held on the second Tuesday of October 1870. The court below, on motion of the respondent's counsel, for the reasons stated in the opinion of the court, quashed the petition, and dismissed the proceedings; whereupon the cause was removed to this court, and the quashing of the petition was here assigned for error.

THOMPSON, C. J., delivered the opinion of the court. We think the court below committed a clear error, in quashing the complaint of the requisite number of citizens

(Place of holding elections.)

of McKean county, complaining of an undue election of the respondent as county treasurer, at the general election of 1870. It sets forth what is claimed as material violations of the election laws, in three districts or townships, giving sufficient majorities to elect the respondent over the contestant by an aggregate of thirty-two votes in the county. The complaint is, in holding the elections in these three districts, at different places from those established by law, and designated in the sheriff's proclamation; to wit, in Wetmore township, the place of holding the annual elections, as fixed by law, is at the house of William Toby, in said township; whereas, it is alleged, it was held at the school-house, at Wetmore station, three miles distant, without authority of law, and at which were cast, returned and counted for Charles C. Melvin, the respondent, forty-seven votes, and for the contestant, John R. Chadwick, four votes: in Bradford township, the place fixed by law for holding the election, and designated by the sheriff's proclamation, was the school-house in the village of Littleville; whereas, the election was not held there, but at a school-house more than half a mile distant, across Tunungwant creek, at which place there were cast, returned and counted one hundred and eighty-three votes for the respondent, and one hundred and fourteen votes for the contestant: in Hamlin township, the election, it is alleged, was not held at the Aldrich school-house, the place fixed by law and the sheriff's proclamation, but at a vacant house, more than half a mile distant, at which were cast, returned and counted for the respondent twenty votes, and for the contestant four votes. The complainants allege that these township returns were illegal, and should not have been counted in the return of the election for treasurer, and which, if not counted, would leave the aggregate vote of the county (if not otherwise changed by uncounted votes, if any, in favor of the respondent, or by deductions from the contestant), to stand, 358 votes in favor of the former, and 575 for the contestant, giving the latter a majority of 271 in the county.

(Place of holding elections.)

The learned court quashed the petition, on motion, because it was not alleged in it, that these irregularities were committed for the purpose of advancing the election of the respondent and defeating the complainant. This was not material, we think, nor necessary; had it been, the petition might have been amended; it was merely formal; the complaint was of an undue election, that the respondent was illegally and wrongfully returned, and the contestant duly elected and entitled to the return; this was sufficient to give jurisdiction. Another reason for quashing the petition was, that it did not allege that illegal votes were given, in those districts, enough to change the result of the election; a third was, insufficiency of the complaint in specifying the irregularities complained of in Corydon and Liberty townships; a fourth, that if all the allegations in the petition were true, they were insufficient to change the result of the election; and lastly, that no decree or order had been prayed for in the petition, nor time or place fixed for a hearing.

The second and fourth reasons for quashing the complaint, seem entirely to ignore, as of no consequence, a compliance with the law fixing the places for holding the election in those districts, by acts of the legislature and court, to wit: by the act of 5th March 1841, in Bradford township, at the school-house in Littleville; by the act of 4th February 1859, in Hamlin township, at the Aldrich school-house; and in the township of Wetmore, by the court of quarter sessions of McKean county, at the house of William Toby. The complaint shows that the election for 1870 was not held at either of the above-mentioned places, but at other and entirely different places, neither fixed by law nor by the action of the court.

The places for holding the general elections in this commonwealth, have always been fixed, either directly by the legislature, or by the courts, under authority given them by the legislature, or by a vote of the people, under the act of 20th April 1854. Hundreds of acts on our statute books fully attest this legislative supervision of the appointment

(Place of holding elections.)

of places for holding general elections, which is extended to all possible contingencies that may occur; for instance, where a particular building is designated as the place for holding the elections in a township or district, and is destroyed, changed or altered, so as to be unsuited for the purpose, another place must be assigned by the proper court, subject to the action of the electors under the act of 1854: see act of 17th April 1866. Even in case of the existence of a contagious disease, rendering a change necessary, the place for holding the election must, in that case, be designated by the governor, and notice thereof given by the sheriff, at least seven days before the day of the election: see 94th section of the act 2d of July 1839.

Can it, therefore, be maintained, in view of these provisions of law, that the places fixed for holding elections are merely directory, and may be disregarded by the election officers, without any other effect on the poll than that which takes place in all regularly-defined districts? We, assuredly, think not. What is the meaning of the requirement in the act of 1839, of the notice to be given by the sheriff, by proclamation, of the time and place of holding the general elections, if not to notify voters where they are to assemble for the purpose of voting? This duty is mandatory upon the sheriff. A fixed place, it seems to me, is as absolutely a requisite, according to the election laws, as is the time of voting; the holding of elections at the places fixed by law, is not directory; it is mandatory, and cannot be omitted, without error. I will not say that, in case of the destruction of a designated building, on the eve of an election, the election might not be held on the same or some contiguous ground, as a matter of necessity; *necessitas non habet legem*; but then the necessity must be absolute; discarding all mere ideas of convenience. It is, however, not necessary to adjudicate authoritatively as to this. To remove the place of election three miles from that designated by law, or, from a village and across a considerable stream a half mile or more distant from the village

(Place of holding elections.)

where it ought to have been held, or, from a designated school-house to a vacant house more than half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein void, and if the votes taken be counted, constitutes an undue election. This was decided by a committee of the house of representatives of this state, in setting aside an election return from Potter county, which gave the seat to the contesting member, Mr. Beck, against the sitting member, Mr. McGhee; the sole ground was, that the election had been held at a place not fixed by law, in one of the townships of the county, but at another place. House Journal 1856, page 204. This was not a decision by the house, in its political character, as suggested, but by a committee, in a judicial character; there were one or more distinguished lawyers upon it; indeed, the election laws are generally as well understood by laymen, in the country, as by lawyers, and it is no argument against that decision, that laymen were of the committee.\*

By the 15th section of the act of 2d July 1839, the inspectors and judges are required "to meet at their respective places appointed for holding the election in the district to which they respectively belong, before nine o'clock in the morning of the second Tuesday of October of each and every year," &c. Where is there any authority for meeting elsewhere? I find none. But this was disregarded as to the places fixed, in the case in hand, without even an attempt to show an overruling necessity justifying it, if we could concede that that might justify it. It seems to us, that if the judges could carry and hold the election in districts half a mile distant from the appointed places, they might carry and hold them three miles, as they did in one district complained of, and if they might go three miles distant, they might, without altering the

\* A distinguished senator lately said to the author, that modern legislative precedents were of no authority; that the decision of a contested election had become simply a question of power, without regard to the right.

(Place of holding elections.)

principle of action in the least, go ten. This would, assuredly, inaugurate a fruitful source of fraud, and furnish a most fertile field of litigation; we cannot give our assent to any such practice. In *Juker v. Commonwealth*, 20 Penn. St. R. 484, it is said, that where the law prescribes a time and place for holding a corporate election, the officers may not hold the election at another time and place. Without elaborating this point further, we regard the elections held in the districts named, as void, for the reasons suggested, and hold that the returns should have been stricken out by the return judges, if the facts be as alleged, and so far they are not disputed.

That a whole election district may be stricken out, as showing an entire disregard of conformity to law in holding it, either by design or ignorance, is now well settled. *Juker v. Commonwealth*, 20 Penn. St. R. 484. The minority opinion of this court, in the case of the contested elections of 1868 (65 Penn. St. R. 44), was referred to in the argument of respondent's counsel, for a contrary doctrine from that claimed here, but he misquotes that opinion; it is there said, "I maintain, that there is nothing which will justify the striking out of an entire division, but an inability to decipher the returns, or showing that not a single legal vote was polled, or that *no election was legally held*;" per Thompson, C. J. The last we hold is what occurred here, to wit, that no election was legally held in the districts mentioned in the complaint of the petitioners. The doctrine of striking out entire divisions, was held by the common pleas in that case, and in *Batturs v. Megary*, 1 Brewst. 162, in which we are referred to a decision, in 1859, by Judge Taylor, in Cambria county, to the same effect.\* In my opinion, however, this ought never to be done, where a legal election, as to time and place, is held, although fraudulent votes shall have been received; the remedy, in such a case, is, to purge the polls, by striking out the fraudulent votes, if possible.

\* Cambria County Election. Altoona Tribune, 10th February 1859.

(Place of holding elections.)

We need not notice the suggestion, that the county treasurer is not within the general election laws requiring time and place to be fixed for the election, as is the case with other officers. This is so obviously erroneous, that we will not spend time upon it.

We think that, if the facts be as stated in the petition, in regard to Corydon township, viz: that the election was not opened until two o'clock P. M. of the day, instead of between six and seven A. M., as required, the return should have been rejected; but I think this cause of complaint is not sufficiently averred, as it is conjoined, in its injurious effect to the contestant, with Liberty township; it should have been set forth separately. If necessary, this, being formal, perhaps, might be amended, by stating the loss of votes occurring to the contestant in each of these districts; but it is likely that this will not be necessary, if the other causes of complaint in the petition be made out. It seems, that amendments are allowable in cases of this kind. Contested Election Cases of 1868, 65 Penn. St. R. 35. (Opinion of the majority of this court, per Agnew, J.)

In conclusion, we think the learned court erred in quashing the petition in this case, and that the order to that effect should be reversed; and it is now ordered, that the same be reinstated on the record, and that the court of quarter sessions of McKean county do proceed to hear, consider and decide this case, in accordance with law and the views herein expressed.

Proceedings reversed and *procedendo* awarded.

---

The doctrine of the principal case, that time and place are of the substance of every election, is generally conceded to be law. *Dickey v. Hurlburt*, 5 Cal. 343. (See *People v. Murray*, 15 Cal. 221.) Accordingly, it was held, that if the election officers opened the polls and held the election at a place not authorized by law, and at a distance from the place appointed, without any excuse therefor, the poll must be rejected as invalid. *Knowles v. Yeates*, 31 Cal. 82. So, it has been determined

(Form of tickets.)

by the supreme court of New Jersey, that if the usual place of meeting of a religious society have been changed by them, an election of trustees at the old place of meeting, is invalid. *Miller v. English*, 1 Zab. 317. And see *Juker v. Commonwealth*, 20 Penn. St. R. 493; *Commonwealth v. County Commissioners*, 5 Rawle 75; *Marshall v. Kerns*, 2 Swan 68; *Foster v. Scarff*, 15 Ohio St. R. 535.

---

## CARPENTER v. ELY.

In the Supreme Court of Wisconsin.

DECEMBER TERM 1855.

(REPORTED 4 WISCONSIN 420.)

[Form of tickets.]

If a ballot contain the names of two persons for the same office, it is bad as to both; but this does not vitiate it as to candidates for other offices upon the same ticket.

Where there is a doubt as to the person intended to be voted for, by reason of a misspelling of the surname, or of the addition of a different or erroneous Christian name, facts and circumstances of public notoriety, *dehors* the ballot, connected with the election and the different candidates, are competent evidence to ascertain for whom the ballots were intended to be cast.

It is competent for the court and jury to go behind the certificate of the canvassers, for the purpose of determining who was legally elected to a contested office.

This was an information in the nature of a *quo warranto*, exhibited by the attorney-general, at the relation of Matthew H. Carpenter, against George B. Ely, to inquire by what authority the defendant claimed to exercise the office of district-attorney of the county of Rock.

There was a special verdict finding that the general election held in the county of Rock, on the Tuesday next succeeding the first Monday of November 1854 (aside from the town of Turtle), was in all things duly held and conducted; that at said election, there were cast, for the office of district-attorney, ballots as follows: for George



(Form of tickets.)

B. Ely, 1098; for George B. Ela, 8; for Ely, 3; for Ely Ely, 1; for Matthew H. Carpenter, 1081; for D. M. Carpenter, 4; for M. D. Carpenter, 2; for M. T. Carpenter, 1; for Carpenter, 1; and for S. J. Todd, 676. That in the town of Turtle, the election was regularly held according to law, and that the following ballots were there given for district-attorney: for S. J. Todd, 106; for Matthew H. Carpenter, 28; and for George B. Ely, 3. That a certificate of election was given to the defendant, who gave bond and took the oath of office, but performed no official duty prior to the 8th January 1855. That the ballots above mentioned, containing the name of Carpenter, were all intended for Matthew H. Carpenter, but were not abbreviations of his name; that those cast for George B. Ela were intended for the defendant; and that the relator was duly and legally elected to the said office of district-attorney. The questions arising upon the evidence and upon the rulings of the court below, are fully stated in the opinion.

*Smith*, attorney-general, for the relator.

*Ely*, defendant, *in propria personâ*.

COLE, J., delivered the opinion of the court. This was an information in the nature of a *quo warranto*, filed against the respondent for an alleged intrusion into the office of district-attorney for Rock county. The respondent, in his plea, in substance, sets up an election to the office, at the general election in November 1854; that he had received a certificate of election from the clerk of the county-board of supervisors of said county, had filed his bond and taken the oath of office, and therefore might lawfully enjoy and exercise the same. Issue was taken upon the allegation of the plea, that the respondent was duly and legally chosen and elected to the office of district-attorney, and that he received a greater number of

(Form of tickets.)

votes for that office, at said election, than any other candidate; this issue was sent to the circuit court of Rock county for trial; the jury found a special verdict, upon which the relator now moves for judgment. The questions raised upon the argument can be conveniently considered in the order they are presented to us in the finding of the jury.

The ballot cast in Magnolia, which was rejected by the town-canvassers, because it contained the names of two persons for the office of senator, should have been counted for the respondent. That ballot was undoubtedly bad, so far as the office of senator was concerned; there was but one senator to be elected, at that election, in the Magnolia senatorial district, while the ballot contained the names of two persons designated for the office, and as a matter of course, it was impossible to tell who was intended to be voted for. R. S., ch. 6, § 28. But the fact that the ballot was not good as to the office of senator, did not necessarily vitiate the whole ballot; it was, with the exception of this circumstance, entirely regular as to the office of district-attorney, and other officers upon the ticket, and we can see no valid objection to counting it as to them. It frequently happens that an elector, through inadvertence or mistake, casts a ballot which contains the names of more than one person for the same office, while there are a dozen other names upon it, for as many different offices, all regular and proper; and it seems rather a rigorous rule, to declare that he shall lose his vote as to all, because the ballot is bad in one particular. If he lose his vote as to the office for which his ballot is double, it would seem to be all that public policy, the security of the ballot-box, or a sound construction of the statute, requires.

The vote in the town of Turtle was rejected by the county-canvassers, because no poll-list, with the oath of inspectors of election of said town, accompanied the statement of votes made and sent by such inspectors to the clerk of the county-board of supervisors, in conformity to

(Form of tickets.)

the provisions of ch. 6, § 29; otherwise, the statement was regular and unexceptionable, and was delivered by the chairman of the town-board of supervisors to the clerk, within seven days after the election. Upon the trial of the cause, the town-clerk of Turtle was produced and sworn to records of that town, on file in his office, to show that the election was regularly notified and conducted, and that the votes were ascertained and canvassed according to law; and also to show the number of votes cast for the different candidates for the office of district-attorney in that town. The chairman of the town-board of supervisors of the town of Turtle was also sworn and testified, that he acted as one of the inspectors of election, at that election, that such inspectors were duly sworn, before the polls were opened, and that the election was conducted in strict conformity to the statute. All the testimony was admitted subject to objection as to its competency, but we are of opinion, that it was legal and competent. The jury, in their special verdict, also find that the election in that town was regularly notified and held according to law.

Under these circumstances, the twenty-eight votes given for the relator in that town, for the office of district-attorney, and the three given for the respondent, without all doubt, should be counted for them respectively. It is true, ch. 6, § 25, requires that the oath taken by the inspectors shall be annexed to and returned with the poll-book, to the clerk of the board of supervisors; while § 49 makes it the duty of the inspectors to enclose one of the poll-lists with the statement of votes made by them. Whether these provisions of the statute must be strictly complied with, before the county-canvassers are authorized to receive and act upon the statements thus made to them, it is not necessary, in the attitude of this case, to inquire; but we do feel it our duty to say, that they are certainly safe and salutary provisions of law, and ought not to be disregarded by inspectors of elections. The duties of these canvassing boards are, in the main, ministerial. Attorney-

(Form of tickets.)

General *v.* Barstow, 4 Wis. 567; People *v.* Van Slyck, 4 Cow. 322; Ex parte Heath, 3 Hill 42; People *v.* Stevens, 5 Hill 616, Nelson, C. J. But perhaps, the board of county-canvassers might, under the provisions of § 95, have canvassed the Turtle vote, notwithstanding the informality in the return. Conceding, however, that the county-board decided correctly upon the facts before them, in this proceeding we are bound to go back and rectify this mistake or omission, and count the vote; for it is the election by a plurality of votes which constitutes the right to an office, and that right cannot be defeated by the mistake, negligence or misconduct of the canvassing boards. Attorney-General *v.* Barstow, 4 Wis. 567; People *v.* Vail, 20 Wend. 12; Ex parte Heath, 3 Hill 42.

It further appears, from a stipulation filed in the cause, and the jury so find in their verdict, that there was given at that election for the office of district-attorney for said county, not including the vote in dispute in Magnolia, or the votes given in the town of Turtle: for George B. Ely, the respondent, 1098 votes; for George B. Ela, 8 votes; for Ely Ely, 1 vote; for Ely, 3 votes; for Matthew H. Carpenter, the relator, 1081 votes; for D. M. Carpenter, 4 votes; for M. D. Carpenter, 2 votes; for M. T. Carpenter, 1 vote; for Carpenter, 1 vote; for S. J. Todd, 676 votes. The relator claims that all the votes which were cast for Carpenter, with the different initials, were intended by the persons who cast them, to be cast for him, the relator; and the respondent claims that the eight votes cast for George B. Ela, being *idem sonans* with his name, should be counted for him, the respondent. The following facts, which were stipulated or agreed upon by the parties, were admitted in evidence, subject to the respondent's objection as to their competency. That before the election in November 1854, it was announced to the electors of Rock county, in all the newspapers printed in the county, that George B. Ely and Matthew H. Carpenter would be, and were candidates for the office

(Form of tickets.)

of district-attorney of the county; that at this time, there was no lawyer in the county, eligible to the office of district-attorney, of the name of George B. Ela, Ely Ely, or Ely, and that there was no lawyer whose surname was Ely, except the respondent; that there was no lawyer in the county by the name of D. M. Carpenter, M. D. Carpenter, M. T. Carpenter, or whose surname was Carpenter, except the relator; that there were no votes cast in the county, at said election, for any persons of the names of Ely and Carpenter, except for the office of district-attorney; and that both the relator and respondent were practising attorneys, at that time, in the county and eligible to the office.

We are of opinion that these facts were competent evidence to go to the jury. The principal question or matter in dispute was, to ascertain and determine for whom these votes, with the different initials, were intended. Were those given for Carpenter, with the different abbreviations and initials, intended to be cast and given for the relator, Matthew H. Carpenter? And were those given for Ely, with the various initials and abbreviations, intended to be given for the respondent, George B. Ely? And how was this intention of the voter to be ascertained? By reading the name on the ballot and ascertaining who is designated or meant by that name? Is no evidence admissible to show who were intended to be voted for under these various appellations, except such evidence as is contained in the ballot itself? Or may we not gather this intention of the voter, from the ballot explained by surrounding circumstances, from facts of a general public nature connected with the election and the different candidates, which may aid us in coming to the right conclusion? These facts and circumstances might, perhaps, be adduced so clear and strong, as to lead irresistibly to the inference, that a vote given for Carpenter was intended to be cast for Matthew H. Carpenter. A contract may be read by the light of surrounding circumstances, not to contradict it, but in order

(Form of tickets.)

more perfectly to understand the intent and meaning of the parties who made it. By analogous principles, we think that these facts and others of like nature connected with the election, could be given in evidence, for the purpose of aiding the jury in determining who was intended to be voted for.

In New York, courts have gone even further than this, and held, that not only facts of public notoriety might be given in evidence to show the intention of the elector, but that the elector who cast the abbreviated ballot, might be sworn as to who was intended by it. *People v. Ferguson*, 8 Cow. 102.\* This is pushing the doctrine to a great extent, further, we think, than considerations of public policy and the well-being of society will warrant; but to restrict the rule, and say that a jury must determine from an inspection of the ballot itself, from the letters upon it, aside from all extraneous facts, who was intended to be designated by the ballot, is establishing a principle unnecessarily cautious and limited.

In the present case, the jury, from the evidence before them, found that the two votes given for M. D. Carpenter, the four votes given for D. M. Carpenter, the one for M. T. Carpenter, and the one for Carpenter,† were, when given and cast, intended by the electors who gave and cast the same respectively, to be given and cast for Matthew H. Carpenter, the relator. Such being the case, it clearly follows that they should be counted for him. It is not for us to enter upon an examination of this testimony, weigh it and determine whether it would lead our judgment to the same conclusion; we can only say that the testimony was competent, and the jury have declared that

\* The elector may be asked for whom he intended to vote, as a circumstance in the case. *People v. Pease*, 27 N. Y. 45. But evidence of his mental purpose in depositing the ballot, is not admissible. *People v. Saxton*, 22 N. Y. 309.

† In *People v. Stevens*, 5 Hill 616, it was said by Chief Justice Nelson, that a ballot containing only the surname of one of the candidates, ought not to be estimated by the canvassers.

(Form of tickets.)

it was sufficient to prove the facts found by them. The jury likewise found that the name of George B. Ela was *idem sonans* with the name of the respondent, and that the eight votes written George B. Ela were given and cast for the respondent, and were so intended by the electors who cast them; and further, that the relator was duly and legally elected district-attorney of Rock county, for the term of two years from the first Monday of January 1855. Upon this verdict, judgment of ouster must be given against the respondent, and establishing the right of the relator.

An instruction was asked for by the relator and given by the court, to which the respondent excepted; and three instructions asked for by the respondent, which the court refused to give, and to this ruling the respondent also excepted. It is believed, that there are no questions arising upon the instructions which have not been anticipated and passed upon in the observations already made.

The verdict shows that the relator received a plurality of the legal votes cast for the office, and effect must be given to this election, notwithstanding the certificate of election has been given to the respondent. A canvassing board cannot create a right to an office; that must be based upon an election. The respondent offered his certificate in evidence, but has not seriously contended that it was conclusive and final; it was perfectly competent for the court and jury to go behind the certificate, and determine who had been legally elected to the office. 4 Cow. 322; 8 Cow. 102; 20 Wend. 12.

Judgment for relator.

---

Wherever the vote by ballot prevails, it is generally provided, in some shape, that the ballots shall be in such form as not to be outwardly distinguishable from each other. It is, of course, impossible to carry out strictly such provisions of the law; and it has accordingly been held, that where a statute provided that no ballot should be received or counted, unless the same were written or printed upon white paper, without any marks or figures thereon, intended to distinguish one

(Form of tickets.)

ballot from another, ballots upon paper tinged with blue, which had ruled lines (not placed there, however, as distinguishing marks), were legal ballots within the meaning of the act. *People v. Kilduff*, 15 Ill. 492. But under a similar law, it was determined in Pennsylvania, that ballots having an eagle printed thereon were in violation of the law, and should be rejected. *Commonwealth v. Woelper*, 3 S. & R. 29.

The designation of the particular office intended to be voted for, endorsed on the outside of the ballot, is obviously an important point in determining the result of the election. It has been held, however, that a statute requiring the ballots to be endorsed in a particular manner is directory only, not imperative; and that ballots headed for "*trustees of public schools*," instead of *common schools*, sufficiently designated the title of the office, and manifested the intention of the electors. *People v. McManus*, 34 Barb. 620. The intention of the electors, in casting their ballots, must control; and therefore, ballots for "*police justices*" were held to be properly counted in an election for "*police magistrates*." *People v. Matteson*, 17 Ill. 167. The ballots are to be construed in the light of surrounding circumstances, in view of which the elector used the language on his vote; and where the description or designation of the office on a ballot, is applicable to two or more offices, parol evidence is admissible to show which of them was intended by the voter. *State v. Goldthwaite*, 16 Wis. 146; and see *State v. Elwood*, 12 Wis. 552. Where by law, several distinct offices are filled by the same incumbent, it is not necessary that all the several offices should be designated on the outside of the ticket; the meaning of the word "*designate*" is, that the voter shall indicate or point out, on the outside of his ticket, by something known or determinate, the offices for which he intends to vote. *Luzerne County Election*, 3 Penn. L. J. 155; *Clinton County Election*, *Ibid.* 160.

A ballot that contains the names of more persons than are to be voted for to fill the vacancies in the particular office, is illegal, and must be rejected on the canvass. *Election of School Directors*, 6 Phila. 437. Thus, where there were but two school directors to be voted for, and the tickets contained three names, the last to fill a vacancy, when in fact no such vacancy existed, it was held, that such tickets ought not to be counted. *Blockley Election*, 2 Pars. 534. And it makes no difference, in such case, that one of the three was in fact ineligible to the office, since the question of his eligibility could not be determined by the can-



## (Form of tickets.)

vassers. *State v. Tierney*, 23 Wis. 430. But a ballot containing the name of the person voted for, and the office for which he is designated, two or more times, is not, for that reason, to be rejected; it is to be counted as one ballot. *People v. Holden*, 28 Cal. 124; *Case of Ashfield, Cush. Elect. Cas.* 583. On the 17th October 1732, the general assembly of Pennsylvania determined that tickets containing a less number of names than, by law, are directed to be returned for representatives, were informal and invalid, and ought to be rejected in the count. *Galbraith's Case*, 3 Votes of Assembly 184. But this would scarcely be held for good law, at the present day. See *Latimer v. Patton*, 1 Cong. Elect. Cas. 69.

The weight of authority, though there are some conflicting decisions, is in favor of the position, that where a candidate is voted for by the initials only of his Christian name, parol evidence is admissible to apply the ballot to the candidate for whom it was intended; thus, an elector was permitted to testify that a ballot for H. F. Yates was intended for Henry F. Yates. *People v. Ferguson*, 8 Cow. 102. So, a ballot for J. R. Eastman was counted for John R. Eastman, on proof that such was the intention of the elector. *People v. Seaman*, 5 Denio 409. And so also, it may be shown that ballots for Benjamin C. Welch, Junior, and Benjamin Welch, were intended for Benjamin Welch, Jr. *People v. Cook*, 8 N. Y. 67. In England, it has been held, that voting-papers inscribed Wm. Bradley and Willm. Bradley, were admissible as votes for William Bradley. *Regina v. Bradley*, 3 Ellis & Ellis 634. And the house of representatives of Massachusetts, in 1867, admitted votes for Jonas Champney and J. Champney, though the candidate's name was Jonas A. Champney, and he had a father living and eligible, whose name was Jonas C. Champney. 3 Am. L. Rev. 142. These decisions, however, are not held for law in Michigan, where it has been decided, that a ballot for J. A. Dyer ought not to be canvassed for James A. Dyer; though, even there, the use of a common and well-understood abbreviation will not vitiate the ballot. *People v. Tisdale*, 1 Doug. 59; *People v. Higgins*, 3 Mich. 233; *People v. Cicott*, 16 Mich. 283. And ballots containing a name *idem sonans* with that of a candidate, but differently spelled, are to be counted as thrown for him. *People v. Mayworm*, 5 Mich. 146. In Alabama, a ballot for "Pence," when the candidate's name was "Spence," was rejected. *State v. The Judge*, 13 Ala. 805. And see Opinion of the Judges, 38 Maine 597.

In congress, it has repeatedly been decided, that a candidate is enti-

(Qualification of election officers.)

bled to the benefit of all ballots which were manifestly intended for him. *Turner v. Baylies*, 1 Cong. Elect. Cas. 234; *Williams v. Bowers*, Ibid. 263; *Willoughby v. Smith*, Ibid. 265; *Root v. Adams*, Ibid. 271; *Mallary v. Merrill*, Ibid. 328; *Colden v. Sharpe*, Ibid. 369; *Hagunin v. Ten Eyck*, Ibid. 501; *Wright v. Fisher*, Ibid. 518; *Chapman v. Ferguson*, 2 Cong. Elect. Cas. 267.

---

## BOILEAU'S CASE.

In the Court of Common Pleas of Philadelphia.

MARCH TERM 1845.

(REPORTED 2 PARSONS 503.)

[*Qualification of election officers.*]

It is no sufficient ground for setting aside an election for alderman, that one of the candidates for another office acted, temporarily, as a clerk of the election, without having taken the oath required by law.

Nor, in the absence of proof of fraud, that there had been a thoughtless inconsiderate interference with the tickets, by a third person, who came into the room whilst the officers were canvassing the tickets.

This was a petition contesting the election of Isaac Boileau to the office of alderman of the Third ward of the district of Kensington. The facts of the case are fully stated in the opinion.

KING, P. J., delivered the opinion of the court. In the matter of the contested election of alderman of the Third ward, Kensington, two grounds have been assigned as affording sufficient reasons for setting aside this election. 1. It is said, that one of the candidates for assessor acted as clerk of the election, without taking the oath required by law: 2. That third persons, not officers of the election, meddled with the tickets voted, and otherwise interfered improperly during its progress.

The facts connected with the first alleged irregularity

(Qualification of election officers.)

seem to be these: on the 16th March last, the polls of the Third ward of Kensington, were regularly opened by proper officers, duly sworn or affirmed according to law, for the election of ward officers; towards evening, one of the clerks of the election became so much intoxicated, as to be disqualified for the further execution of his duties; at the request of the inspectors, Samuel C. Coxe acted as clerk, in his place, until after the closing of the polls, and until about three in the morning of the next day, when the formally appointed clerk, having become relieved from the effects of his debauch, appeared and signed the returns. Mr. Coxe, it is admitted, was not sworn or affirmed, as is required by the election law; and he was a candidate, at this election, for assessor. The majority given for Mr. Boileau over his competitor, Mr. Streeper, for alderman, was seventy-three.

The facts connected with the second ground of complaint, viz: the improper interference with the election, by persons not officers, are not very precise. The deposition of Lewis Green, one of the inspectors, however, establishes, that Mr. John Haines, a candidate for judge, was occasionally in the room where the election was held, during its progress, and after the polls closed, and that a few of the assessor tickets were opened by him; being admonished against this by Mr. Green, he desisted. Daniel L. Young proves that Haines emptied the assessor's box, after the poll closed, but that he stopped, on being told by Mr. Green not to handle any more tickets. Haines, himself, on his examination, admits that he handled some of the assessor's tickets, but no others. Edmund Taylor proves that Haines did handle tickets to a greater extent than was observed by the other witnesses, though his testimony is defective in precision. Mr. Coxe, undoubtedly, assisted the other officers in ascertaining the result of the election, by opening tickets, keeping the tally, &c., and indeed, seems to have acted as if he had been a regularly-sworn officer.

(Qualification of election officers.)

It has not been pretended that this election is, in any particular, tainted with actual fraud; no evidence has been adduced, either showing legal votes to have been rejected, or illegal votes received; the election seems to have been honestly conducted, and to be a fair expression of the sentiments of the people of the ward. Against Mr. Coxe's fidelity, in the execution of the duty he assumed, at the request of the inspectors, nothing has been advanced; and although Mr. Haines did interfere in the count, during its progress, nothing has been shown to establish that anything wrong or improper was done by him, except so far as any interference with the duties pertaining to the regular officers, was improper. If, therefore, this election is set aside, it must be, because there is some incurable irregularity in conducting it, which requires the court to take this course. It is material, to be borne in mind, that the act of assembly which gives this court authority to inquire into and determine upon a complaint of the undue election of an alderman or justice of the peace, requires us, in judging concerning such election, to proceed "upon the merits thereof;" hence, in all cases in which the irregularities in conducting an election are not of a flagrant character, we are required to look into its good faith and integrity; and if they are manifest, we are not to defeat the expression of the popular will, because of some slip in the minor details of the election, which does not prevent our ready ascertainment of what that will truly is. This is the spirit of the act of assembly giving us this delicate jurisdiction; a spirit in entire harmony with our popular institutions; with this landmark before us, indicating what ought to be our direction, we will proceed to inquire into the sufficiency of the objections interposed against the election of alderman Boileau.

The first arises from the fact that Samuel C. Coxe acted as one of the clerks of the election, without being sworn, he being, at the same time, a candidate for the office of assessor. That Mr. Coxe ought to have been sworn, before

(Qualification of election officers.)

proceeding to execute the duties of clerk of the election, is undoubted. If the clerk of an election, originally chosen, become, from any cause, incapable of executing his duties, his place may be supplied by a new appointment; but the substituted officer is required to act on oath or affirmation; hence, Coxe ought not to have acted without taking the qualification required by law. But is the omission to take this qualification, such an irregularity as should induce us, determining on this election, "on the merits thereof," to set it aside? Under the facts disclosed, I think not. All the other officers were sworn; he was called in at a late period, in consequence of the temporary inability of the original sworn officer to act; the neglect to swear him is such an omission as might naturally have been made by persons not familiar with the law, and who may have supposed that, having made one appointment in the manner prescribed by law, their authority was exhausted.

Although in a case in which it is shown, that in making the preparatory arrangements for holding an election, a reckless disregard of, or a criminal carelessness as to, the directions of the law has been manifested, we would hold such an election undue and illegal; yet, where a single mistake, such as occurred here, has taken place, and where there is no reason to infer that the officers of the election acted with bad faith, we would not adopt a course so stringent; such an irregularity is exactly the one the legislature considered we ought to make an allowance for, when we are directed to decide such a disputed election "on the merits thereof." To set aside this election, for such a cause, would smack too much of technicality, for a decision purporting to be made on the merits. I do not mean to say, that the omission to swear or affirm the officers of an election, might not be a sufficient cause for pronouncing it null; under appropriate circumstances, this result would inevitably follow such an omission. But in a case like the present, where the substituted clerk was called in at a late period of the election; where the person

(Qualification of election officers.)

substituted was, like Mr. Coxe, the assessor of the last year, attending the election as such, and where no circumstances savoring of fraud or contrivance appear in the whole transaction, it would be going too far, to declare that, because of such an irregularity, the popular voice, honestly expressed, should not be suffered to prevail.

Nor is the fact that Samuel C. Coxe was a candidate at the election at which he acted as clerk, a sufficient cause for declaring it void. By the 2d section of the act of 13th June 1840 (Purd. Dig. 385), it is declared, that neither that act, nor the general election law to which it is a supplement, "shall be construed to prohibit a judge, inspector or clerk of election from being voted for to fill any township office, or render either or any them ineligible to hold the same." The fact of Coxe's having acted, while a candidate for assessor, as clerk of the election, could, therefore, have no effect on his own election, and certainly none on that of the other candidates. Had the law of 1840 never been enacted, I should have been of opinion, that votes given to an officer of election, could not affect the legality of such election; such votes might be null as to him, on the ground of his want of legal eligibility, but could have no further operation. The personal ineligibility of an election officer, to be chosen to any office at an election at which he acted, could not have the super-added effect of making void the whole election, by any reasonable construction of a law which simply declares all such officers ineligible to any office voted for at such election; this would be punishing the unoffending, for an act over which they had no control. But the proviso of the 2d section of the act of 1840, which declares that the ineligibility of election officers shall not extend to township offices, supersedes all speculation on this subject.

The alleged interference of Mr. Haines, although it was improper, is equally inefficacious for the purpose of the complainant. No fraud is either proved against or attributed to him; nor does the testimony justify any such imputa-

(Qualification of election officers.)

tion; my own impression is, that it was one of those thoughtless and inconsiderate acts often done by perfectly honest and well-intentioned men. But the interference of a third person with the duties exclusively belonging to the officers of an election, where such interference is not shown to have produced injurious results to any one, and where the manner and extent of it leave no just ground to presume fraud or malpractice, ought not to be deemed sufficient to destroy an otherwise fair election. A decision to that extent could hardly be called a decision on the merits; it would be based on the assumption of wrong perpetrated, without actual proof of its existence; it would leave all elections at the mercy of any one hardy enough to intrude himself where he has no business. It would be much more consonant with natural justice, much more consistent with the merits of an election so interfered with, to punish the intruder, without making his act operate to defeat the expressed will of the people, and deprive the candidates of the offices to which they have been chosen.

While this court would not hesitate in setting aside an election, where they were convinced that, in conducting it, the laws of the commonwealth had been infracted, yet they certainly will not exercise ingenuity to find causes for such an adjudication; on the contrary, every fair presumption ought to be made in favor of popular elections, and the leaning ever should be, to sustain them, where this can be done consistently with a faithful and independent maintenance of their purity. In our opinion, the complainants have failed in establishing the election of alderman Boileau to have been undue and illegal; consequently, their complaint must be dismissed.

Complaint dismissed.

---

The principle decided in Boileau's case, was re-affirmed by the court, in *Thompson v. Ewing*, 1 Brewst. 69, in which it was decided, that although a clerk ought not to assume the place of an absent inspector, yet,

(Election officers *de facto*.)

this will not vitiate the election ; an election holden by officers *de facto* is valid. 19 Am. L. Reg. 444-5. And in the case of the Passyunk Election, the same court determined, in December 1847, that a candidate for a township office, or for judge or inspector of elections, is competent to act as judge or inspector of his own election. In September 1869, the court ruled that the following offices or employments disqualified the holders thereof from serving as election officers, namely, clerk in the gas-trust, out-door visitor of the guardians of the poor, lieutenant of a gang of workmen in the navy-yard, post-office letter carrier, and clerk in the mint. 2 Brewst. 133.

---

## COMMONWEALTH v. SMITH.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1863.

(REPORTED 45 PENNSYLVANIA STATE REPORTS 59.)

[*Election officers de facto.*]

If an election for managers of a corporation be not disputed, during their term of office, by *quo warranto*, and they be permitted to act throughout their term, as officers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first.

Certificate from the court of Nisi Prius. This was a *quo warranto* issued on the petition of Isaac Jackson and others, setting forth that they were duly elected managers of the "Olive Cemetery Company," on the first Monday of April 1857, and that Stephen Smith and others, the defendants, under a pretended election, had usurped the said office. The defendants, by their plea, denied the election of the relators, and claimed that they themselves were duly elected, upon which issue was joined. There was a verdict for the relators, subject to the opinion of the court upon the following, among other, reserved points: that the election of 1856, not having been disputed by *quo*



(Election officers *de facto*.)

*warranto*, against the Smith party, during their term of office, and they having acted out their term as directors *de facto*, can the next and subsequent elections held under them, be now disputed, for any vice in the election of 1856? This point was decided in favor of the defendants, which was assigned for error.

*Longstreth*, for plaintiffs in error.

*Gibbons*, for defendants in error.

WOODWARD, J., delivered the opinion of the court. Two sets of managers of the "Olive Cemetery Company" were elected on the first Monday of September 1857, the day fixed in the charter for annual elections; on the 21st of that month, this *quo warranto* was sued out by Isaac Jackson, and the others of his set, as relators, against Stephen Smith, and the others of his set, who were in possession of the books and properties of the company. The defendants were the acting board of the previous year, had appointed the election of 1857, and were duly elected at the time and place appointed; the relators were elected on the same day, but at another place; and they claimed that the election of the respondents was irregular, because they had not been legally elected in 1856, and therefore, had no right to appoint the election of 1857.

Neither the charter nor the by-laws fix the place at which the annual elections shall be held; the board of managers for the time being are, therefore, to fix it. But, say the relators, the acting managers for 1856 were intruders, and are not entitled to the offices they exercised; the answer is, they were officers *de facto*, and if you meant to show that they were not officers *de jure*, you should have brought *quo warranto* in the lifetime of their office. The office was an annual one. How is a title to the office in 1856, to be tried on pleadings that relate entirely to the office of 1857? I have no doubt, that a *quo warranto*,

(Election officers *de facto*.) •

brought within the term of an office, may be well tried after the term has expired; but it is difficult to see how title to a past and defunct office can be tried, in a proceeding instituted, not against any incumbent of that office during its lifetime, but against the incumbent who succeeds for the next year. It is true, that, in general, the persons elected must take upon themselves to support the qualifications of the electors, and the regularity of the proceedings, and I think the respondents do this, when they show themselves elected by lot-holders, at an election appointed and held by a *de facto* board of managers. To impeach the title of the respondents, we will not go back, in the present suit, to impeach the title of their predecessors; as the relators did not think proper to call the title of their predecessors into judicial question, during the year of its vitality, we will, for the present, presume it unquestionable. Of course, it follows, that the election they appointed for 1857, was the regular election, and that the respondents were duly elected.

The other question in the record is not reached, in the view we have taken of the first; if the election of 1856 is not to be overhauled in this action, then the right of Vidal to vote at that election, according to the title he held from Smith, would be an irrelevant inquiry.

Judgment affirmed.

---

Perhaps no question in the law is better settled than this, that the acts of officers *de facto* are as valid, so far as the public is concerned, as those of an officer *de jure*. *People v. Cook*, 8 N. Y. 89, and cases there cited; 14 Barb. 254; *Commonwealth v. Haworth*, 3 Brewst. 445; 19 Am. L. Reg. 444. An officer *de facto* is one who comes into office by color of a legal appointment or election; his title cannot be inquired into collaterally. *Ibid.*; *Northrop v. Gregory*, 2 Abbott U. S. Rep. 505; *Milliken v. Fuller*, 2 Cong. Elect. Cas. 176. All that is done by individuals *de facto* exercising a legal authority, is presumed to be done rightly. *Carpenter's Case*, 2 Pars. 537. A poll will not be rejected simply

(Privileges of electors.)

because the officers were irregularly chosen. *Thompson v. Ewing*, 1 Brewst. 69.

That a *quo warranto* commenced during the incumbency of the defendant, may be prosecuted to judgment, after the expiration of his term of office, was decided in *Hunter v. Chandler*, 45 Mo. 453.

---

SWIFT v. CHAMBERLAIN.

In the Court of Errors of Connecticut.

JUNE TERM 1821.

(REPORTED 3 CONNECTICUT 537.)

[*Privileges of electors.*]

An elector, after having voted, retired to a public-house in the neighborhood, while the election officers were counting the votes : *held*, that he was attending on the business of the election, and therefore, privileged from arrest on civil process.

But, for the violation of an elector's privilege, though maliciously, under lawful and regular process, *trespass* will not lie ; the proper remedy is an action on the case.

This was an action of *trespass* for an unlawful arrest of the plaintiff, tried at Litchfield, before Brainard, J. The defendant admitted the arrest, but justified under a regular writ of attachment which, as an officer, he then held against the plaintiff.

The plaintiff claimed that he was, at the time of arrest, an elector, which was known to the defendant ; that the writ was served on him, on the day of election, while he was there attending on such election ; that he had given in his vote, and after the votes of all the other electors had been given in, he retired to a public-house in the neighborhood, while the proper officers were counting the votes, during which time he was arrested ; he therefore claimed that his arrest was illegal, under the constitution.

(Privileges of electors.)

The defendant insisted that the plaintiff, at the time of the arrest, was not attending the meeting as an elector; that he then waived his privilege of protection, if any he had, by not expressly claiming it; and that if he had any cause of action, the proper remedy was, by an action on the case.

The court instructed the jury that, if they should find that, at the time of the arrest, the plaintiff was in the exercise of his franchise as an elector, and did not waive his privilege of protection, the present action was sustainable, and they must return a verdict for the plaintiff; but if they should find, that the plaintiff, at the time of the arrest, was not in the exercise of such franchise, or that he waived his privilege of protection, they should return a verdict for the defendant. And further that the protection of an elector from arrest, being a right secured by the constitution, a waiver of it could not be inferred from mere silence; and that such protection comprehended the time of reasonably going to, attending on, and returning from the electors' meeting. The jury having found for the plaintiff, the defendant moved for a new trial, on the ground of misdirection.

*Miner* and *Huntington*, for the defendant, in support of the motion for a new trial.

*Boardman*, contra.

HOSMER, C. J., delivered the opinion of the court. Under the charge given to the jury, they must have found that, at the time of the arrest, the plaintiff was in the exercise of his franchise as an elector, and that he did not waive his privilege of protection; from the facts stated in the motion, my mind would be led to the same result; retiring to a house in the neighborhood, while the proper officers were counting the votes, the defendant, on a fair construction of the constitution, was attending on the business of

(Privileges of electors.)

the election; and mere silence, on his part, was no waiver of the privilege. *Lightfoot v. Cameron*, 2 W. Bl. 1113.

The jury were instructed that, if the plaintiff was in the exercise of his franchise, when arrested, and did not waive his protection, the action of trespass was sustainable; but to this I cannot accede. I consider the elective franchise as a noble privilege; and view it, not merely as a public, but likewise as a personal benefit; and the privation of it, maliciously, as vindicable by an action on the case. *King v. Coit*, 4 Day 129; *Ashby v. White*, 2 Ld. Raym. 938; *Starling v. Turner*, 2 Lev. 50; s. c. 1 Vent. 206; *Drewe v. Coulton*, 1 East 563 n.; *Jenkins v. Waldron*, 11 Johns. 114 (ante 190). But the arrest, made in pursuance of a legal judgment and execution, was valid; and the injury, if any, resulted from the malice which prompted the proceeding; the officer acted by lawful and regular process, commanding the arrest in question, and if he was not under the influence of a bad motive, he is not responsible for his conduct to the plaintiff; the *quo animo* must be the gist of any action sustainable against the defendant, and this inquiry is inadmissible to fix on him a trespass. 1 Chit. Pl. 136. When the process of a court has been abused, trespass is the proper action, if the conduct of the officer was, in the first instance, illegal, and produced an immediate injury to the body; as, if the sheriff arrest out of his county, or after the return-day of the writ, or, by any act of his, after the arrest, become a trespasser *ab initio*. 1 Chit. Pl. 185-6. But no such abuse of process exists, in this case; and the only ground of complaint is, a violation of the plaintiff's privilege, for which no action of trespass has ever been sustained. 1 Chit. Pl. 184; *Luddington v. Peck*, 2 Conn. 700; *Tarlton v. Fisher*, 2 Doug. 646; *Cameron v. Lightfoot*, 2 W. Bl. 1190.\*

It was the duty of the officer, in compliance with the execution, to make the arrest, unless he had knowledge that the plaintiff was under the protection of his privi-

\* And see *Kennedy v. Barnett*, 64 Penn. St. R. 141.

(Privileges of electors.)

lege. The arrest, *per se*, was not only valid, but in every view proper, admitting only the above exception; and in many cases, to make inquiry into the various facts which confer on an individual the privilege of protection, and to decide them at his peril, would place an officer in a situation of extreme difficulty. He cannot administer an oath, nor compel the attendance or testimony of witnesses, and is without the means of coming to a satisfactory result. It ought always to devolve on the person arrested, with whom is the knowledge of the facts, to prove that he is under protection, and that this was known to the officer arresting him; and to do this, he must bring his action on the case, which is precisely adapted to such an inquiry.

New trial granted.

---

In all the states, it is believed, that electors are privileged from arrest, except for treason, felony or breach of the peace, during their attendance on the election, and in going to and returning from the same. And this, of course, includes the election officers. Anon., 1 Brewst. 182. The principal difficulty that is likely to arise under this provision is, as to what amounts to a breach of the peace; does it include every indictable offence? or is it confined to those which are attended with actual violence or disturbance of public order? In *Rex v. Wilkes*, 2 Wils. 151, Lord Camden delivered the unanimous judgment of the court of common pleas, that a *libel* was not a breach of the peace, and that a member of parliament was not liable to arrest by reason of having been convicted of that offence; very soon afterwards, however, it was resolved by both houses of parliament, that the writing and publishing of seditious libels was not entitled to privilege. 1 Bl. Com. 166. In *Cecil v. Nottingham*, 12 Mod. 348, where there had been an arrest on Sunday, under an attachment for contempt, Lord Holt said, "suppose it were a warrant to take for forgery, perjury, &c., shall they not be served on Sunday? and shall not any process at the king's suit be served on Sunday? surely, the Lord's day ought not to be a sanctuary for malefactors; and this partakes of the nature of process upon an indictment." And Blackstone says, "it seems to have been understood, that no privilege of parliament was allowable to the members,

## (Privileges of electors.)

their families or servants, in any crime whatsoever, for all crimes are treated by the law as being *contra pacem*. 1 Bl. Com. 166. In 1839, the court of common pleas of Bucks county, Pennsylvania, decided, that a warrant of arrest on a charge of malicious mischief could be executed on Sunday. 1 Haz. U. S. Reg. 263. But the district court of Philadelphia have ruled, that an arrest on Sunday, on a warrant for obtaining goods by false pretences, was illegal, and that the officer who executed it was a trespasser, and liable to an action for false imprisonment. *Bailey v. Simpson*, Binns's Justice 498, n. And see *Commonwealth v. Eyre*, 1 S. & R. 347. The question, in view of these authorities, can hardly be considered as settled, though the weight of authority appears to be in favor of the right to arrest for any indictable offence.

It is the privilege of the elector, not to be compelled to disclose for whom he voted. *Respublica v. Ray*, 3 Yeates 66. This, however, is a personal privilege, and one that may be waived by the elector. *Kneass's Case*, 2 Pars. 553. A legal voter is not deprived of this privilege, simply because his name has been omitted from the list of taxables. *Thompson v. Ewing*, 1 Brewst. 69. Nor, because his vote was received after the legal hour for closing the polls. *Locust Ward Election*, 4 Penn. L. J. 341. But a disqualified person is not entitled to the privilege; he may be compelled to disclose the character of his vote. *McDaniels' Case*, 3 Penn. L. J. 310 (ante 238). It must first, however, be established, that the witness was not a qualified elector, before he can be compelled to testify. *Thompson v. Ewing*, 1 Brewst. 68.

## BROWN v. COMMONWEALTH.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1856.

(REPORTED 4 PITTSBURGH LEGAL JOURNAL 668.)

[Proxies.]

It seems, that the members of a private corporation have not the right to vote by proxy, at the annual election for officers, in the absence of any authority to do so in their charter.

A provision that "each person, being *present* at an election," shall be entitled to vote, excludes the right to vote by proxy.

Error to the court of Common Pleas of Philadelphia. The Keystone Land and Building Association was incorporated in June 1852; the charter provided that "each person, being present at an election, and holding, in his or their own right, one share of stock, shall be entitled to one vote for directors." At the annual election in June 1852 and 1853, votes by proxy were received, without objection; but at the election in 1855, the tellers refused to receive such votes; the directors elected in June 1854, refused to surrender their offices, whereupon a writ of *quo warranto* was sued out, at the suggestion of the new directors.

On the trial, the court below refused to admit evidence on the part of the defendants of the votes by proxy; there was a verdict for the relators, and judgment of ouster; whereupon the defendants took their writ of error, and assigned for error, the rejection of the evidence of the votes by proxy.

*Hanbest* and *Hirst*, for plaintiffs in error.

*Earle* and *Phillips*, for defendants in error.



(Proxies.)

LEWIS, C. J., delivered the opinion of the court. There is some difference of opinion on the question, whether the stockholders in a corporation, purely of a private nature, have a right to vote by proxy. *State v. Tudor*, 5 Day 329; *Taylor v. Griswold*, 2 Green 223; *Ang. & Am., Corp.* ch. 4, § 7. But it seems reasonable to hold that, in a case where the shareholders are embarked in a common enterprise, and where the vote of each affects the interests of the others in the management of the concern, the selection of directors should be made under circumstances favorable to a consultation with each other, so that they may have the benefit of each other's views and information relative to their common interests. This can only be done by requiring the shareholders to be present, when voting.

It is not necessary, however, to decide this question, in the case now before us. The charter declares that "each person, being *present* at the election," shall be entitled to vote; and there is no provision in favor of voting by proxy. By the term "present," we understand the charter to mean an actual, not a constructive presence; this is the ordinary sense of the word; the clause in question, by strong implication, excludes all voting by *absent* stockholders. The error in conducting two former elections passed *sub silentio*, and cannot control the clear intention of the charter. It was no part of the duty of the stockholders to give previous notice of their intention to insist on a compliance with the requirements of the charter; the instrument itself was sufficient notice of what would be required. The judgment of the court below was correct.

Judgment affirmed.

---

The right of voting by proxy is not a general one, and the party who claims it must show a special authority for that purpose; it has been said, that it may possibly be delegated, in some cases, by the by-laws of a corporation, where express authority is given to make such by-laws, regulating the manner of voting. *Phillips v. Wickham*, 1 Paige 598.

(Proxies.)

And it was, accordingly, so held, in *State v. Tudor*, 5 Day 329; in that case, Ingersoll, J., said, "I agree most fully, that by the common law, every vote in a corporation instituted for the public good, either the good of the whole state, or of a particular town or society, must be personally given; so also, every vote given by a freeman for his representative, must be given by him in person; there is no deviation from this rule; the authorities on this subject are uniform: neither can a vote be given in a town or society-meeting, merely on the ground of owning property within the limits of such town or society; but from the very nature of a moneyed institution, the mere owning of shares in the stock of the corporation, seems, of course, to give a right of voting. But whatever might have been the result of reasoning on the nature of moneyed institutions, still, since the passing of the by-law above mentioned, I am very clear that the votes for the officers of this corporation, as well as all other votes relative to it, may be given by proxy."

The authority of this case has, however, been much impaired by the decision of the supreme court of New Jersey, in *Taylor v. Griswold*, 2 Green 223, where it was ruled, that the obligation and duty of corporators to attend in person and execute the trust or franchise reposed in or granted to them, is implied in and forms a part of the fundamental constitution of every charter in which the contrary is not expressed. In that case, it was said by Chief Justice Hornblower, "that when the charter is silent, and no by-laws have yet been passed, regulating the mode of election, and of voting upon other questions that may arise in conducting the ordinary and appropriate business of the corporation, the corporators, when lawfully assembled, must be governed by the same rules and principles that prevail in *all* primary assemblies; that is, until a different rule has been established by some competent authority, every question must be decided, and every election determined, by the majority; or, in other words, by the major part numerically of those who are *personally* present and voting." "It is incidental to every corporation to have the power of making by-laws, regulations and ordinances, relative to the purpose for which it was instituted. But this incidental power of legislation is limited, not only by the terms of the charter (according to the maxim, *expressum facit cessare tacitum*), but by the spirit and design of the charter, the purpose for which it was created, the object which the legislature had in view, and the general principles and policy of the common law. If, in view of these first and elementary

## (Proxies.)

principles, we repeat the question, whether the right to make a by-law, dispensing with the personal attendance of members, and permitting them to appear and vote by proxy, is incident to a corporation, the answer must be in the negative ; such a power is not essential, nor even *apparently necessary*, to carry into effect the object for which corporations are generally created." The learned chief justice then went on to show that such power was not conferred by a general authority, in the charter, to make by-laws for the government of the corporation ; and that although, in the absence of any charter provisions, a corporation has power to provide for the mode of election to its corporate offices, yet, that it does not follow that it may permit its members to delegate their corporate rights, and send an agent or proxy to represent, deliberate, judge and vote for them. "The common law," concludes the learned judge, "which requires all votes to be given in person, is a part of the law of the land ; the by-law in question is repugnant thereto, and consequently void." See 4 Kent Com. 295 n.

A stockholder may revoke a proxy, though given for a valuable consideration, if necessary to prevent a fraudulent use of it. *Reed v. Bank of Newburgh*, 6 Paige 337.

## STATE v. ADAMS.

In the Supreme Court of Alabama.

JANUARY TERM 1829.

(REPORTED 2 STEWART 231.)

## [Majorities.]

Where two candidates receive an equal number of votes, there is no election. The sheriff has no authority to give a casting vote between two candidates for the office of sheriff.

An act providing that the returning officer shall only vote in a certain contingency, is constitutional; a citizen, by accepting office, may waive a constitutional franchise.

If a vacancy in office exist, to be filled by executive appointment, the judiciary cannot inquire into the reasons of the governor for making the appointment.

A failure to elect, creates a vacancy, which can be filled by executive appointment.

Information in the nature of a *quo warranto*, on the relation of John E. Anderson, to inquire by what authority James H. Adams claimed to exercise the office of sheriff of Marengo county.

The defendant alleged in his answer, that at the general election, held for Marengo county, on the first Monday in August 1828, the relator, John E. Anderson, one Henry Chiles and Thomas Adams were candidates for the office of sheriff; that Anderson and Chiles received an equal number of votes, and more than Adams; that in consequence of a mistake in computing the votes, the late sheriff proclaimed Anderson duly elected; that on the Saturday after the election, the mistake having been discovered, the sheriff re-examined the returns, and found that Anderson and Chiles had received an equal number of votes, whereupon he gave his casting vote in favor of Anderson, and forwarded his certificate of the result to the secretary of state. That Anderson did not receive a majority or

(Majorities.)

plurality of votes, at the election, but only an equal number with Chiles, whereby, in consequence of the expiration of the term of office of the former sheriff, the office became vacant, and was filled by the governor, on the 25th September 1828, appointing and commissioning him, the defendant, to the said office of sheriff. That under this commission, he had been duly qualified, had given bond, and had taken on himself and continued to discharge the duties of the office.

The relator put in a demurrer to this answer, which was overruled by the court; a replication was then filed and issue joined, and at the same time, there was a verdict and judgment for the defendant. The relator assigned for error the overruling of the demurrer, and the decisions on certain bills of exception, which are fully stated in the opinion of the court.

TAYLOR, J., delivered the opinion of the court. It is insisted for the relator: 1. That he was legally elected, and is entitled to the office: 2. But if he was not, that there was no vacancy in the office, which authorized an executive appointment; and therefore, the defendant is not authorized to discharge the duties of the office: 3. But if the court should come to neither of these conclusions, that the judgment must be reversed and remanded, because the court below erred in rejecting the evidence offered by the relator, and receiving that to which he objected. I will reverse the order in which these points were discussed in the argument, and consider the third point, in the first instance.

The relator, on the trial of the case in the circuit court, offered in evidence some papers, purporting to be representations to the governor, in the form of petitions of many of the citizens of Marengo, by which he was induced to commission Adams, with a view to show, as he alleged, that fraud was practised upon the governor, in procuring from him the commission; which were ex-

(Majorities.)

cluded. That the judiciary should inquire into the inducements which operated upon a co-ordinate branch of the government, in making an appointment which is confided to its discretion, would indeed be a delicate and unenviable duty; it would be declaring that the courts were more competent to determine upon the qualifications of citizens for office, or, at any rate, that they were more deliberate in investigating those qualifications, than the executive to whom the law has confided the appointment. But in what manner, and at what time, is such an investigation to be made? is it to be done, upon the request of the governor, and are we to wait until such a request is made? or is any person who conceives himself either wiser, or more anxious for the public good, than the chief officer of state, to give information to the courts? And if we are to inquire into the manner in which the governor has made an appointment, what hinders us from also looking into elections made by the people, and excluding men from the offices to which they have been elected, because we believe such election was secured by fraudulent practices? This doctrine is fraught with consequences of a nature too plainly intolerable to be entertained for a moment. The court was, therefore, right in rejecting the testimony offered by the counsel for the relator, as specified in the record.

It was equally so, in receiving the returns from the precincts, made by the sheriff; these returns form the *data* upon which the sheriff is to arrive at the result of the election; they are evidence to him of the number of votes given in, at each precinct, and for whom. If they had been locked up, when received by the sheriff, and never inspected or seen by any other person, they would certainly have formed a part of the evidence to be submitted to the jury, in trying the question of right to the office. As it is from these returns that the sheriff ascertains the result, it is conceived, they are admissible before the jury, to show that he was authorized to draw

(Majorities.)

such a conclusion from the premises before him; it is true, they would be far from conclusive, but liable to countervailing testimony, going to show error from mistake or design. Does, then, the circumstance of those returns having remained open to public inspection, and an alteration having been made in one of them, render them incompetent? It seems to me, this question answers itself; these facts with respect to them, are to be ascertained, and if so, must they not be before the court, before such inquiry can be made? Such circumstances are to be weighed by the jury, in determining what credit they will give to the returns, but cannot affect their competency.

As to the second point, it is believed, this case is, in substance, one between the relator, Anderson, and the defendant, Adams. It is the true interest of the state, that every citizen should have his rights, and therefore, the state will lend its name to a citizen to assert those rights, when they affect his title to a public office of which another is in the enjoyment; but this court does not believe that either law or policy requires, that one man, in the occupancy of an office, shall be put out upon the complaint of a stranger. It is good policy, that offices shall be filled, particularly so important an office as that of sheriff, not that they shall be vacant; therefore, if the relator has no right to the office, the inquiry is terminated. But as that branch of the subject is more immediately connected with this part of the investigation, than any other, I will proceed now to inquire whether, if it be admitted the relator was not elected, there existed such a vacancy in the office as authorized the governor to appoint. The words of the constitution, relating to the subject (to be found in the Laws of Alabama 924, § 24), are as follows: "A sheriff shall be elected in each county, by the qualified electors thereof, who shall hold his office for the term of three years, unless sooner removed, and who shall not be eligible to serve, either as

(Majorities.)

principal or deputy, for the three succeeding years; should a vacancy occur, subsequent to an election, it shall be filled by the governor, as in other cases; and the person so appointed shall continue in office until the next general election, when such vacancy shall be filled by the qualified electors; and the sheriff then elected shall continue in office for three years." This section provides that elections for this office shall regularly take place; therefore, it would be a strained and forced presumption, to suppose that there would be no election held, as that would be directly in the teeth of the provision. The whole object of the section is, to secure the means by which offices of this description, throughout the state, shall be filled, and the terms for which they shall be held.

The convention had their eye fixed upon the object of keeping the office always occupied; they determined that public policy required those officers should be elected by the people, and that the same persons should only retain the office for three years. It was easy to provide that elections should be held at stated periods, and it was as easy to determine that the individual should only continue in office three years; but the convention could make no provision by which the office would be, at all times, filled by the people; there might be vacancies, and as it would require time to fill such offices by the people, it was necessary that the duties of the office should be discharged in the mean time. The convention thought it wiser that the election by the people should be postponed until the next general election for members of the next general assembly, &c., than that they should be specially convened for that particular purpose, and that, in the mean time, the governor should make an appointment. The convention, therefore, intended to provide for filling the office by an election, in the first instance, and a vacancy, by executive appointment, when it occurred; they took it for granted, elections would always be held in conformity with the provisions of the constitution, and they proceeded to provide a mode of ap-



(Majorities.)

pointment, in the event of the election by the people not effecting the object of providing a sheriff for the next three years, that is, in case the office should be vacant, from any cause, after such election was held.

The words of the constitution are, "should a vacancy occur, subsequent to an election," &c., clearly meaning, should a vacancy occur, subsequently to the time prescribed by law at which a sheriff is to be elected, not to the time when a sheriff is actually elected. This construction, and no other, completely fulfils the intention of the constitution in keeping an incumbent always in office; the former sheriff holds his office until the next election has terminated; and there can never be a vacancy for a longer time than it requires to apprise the governor that it is necessary to fill it. When the time fixed by law for the general election arrives, the people meet at the polls, and give in their votes; should they fail to elect a sheriff, by being divided as to their choice, the general election terminates, and a vacancy in the office of sheriff takes place. It is "subsequent to the election;" there was no vacancy before, as the former sheriff continues in office until that time; there is one now, because no election is effected, and it is within the authority of the governor to fill it.

But it is argued that, in this instance, the commission shows that the governor did not intend to make an appointment except for a limited period, viz: until the contest was decided, and the contest being abandoned, the defendant is no longer authorized to act in the office. It was clearly the intention of the governor, to appoint the defendant for the whole time that the office would have been vacant without such appointment, and the manner in which he has expressed such intention is not material.

The main inquiry now arises, was the relator elected sheriff of Marengo county, at the general election? As there is a difference of opinion among the members of the court on this subject, and as it is of great importance to the parties, I shall consider it with some minuteness, and

(Majorities.)

endeavor to give, with plainness, the reasons which operate upon my mind in bringing me to the conclusion to which I have arrived, and which is the result of my best judgment and most mature reflection. To determine this question, it is only necessary to ascertain whether the sheriff, Barton, was authorized to give the casting vote to the relator, the people having given an equal number of votes to him and to Chiles; for, I consider it incontrovertible, that if he had the power immediately at the close of the election, he had it, whenever he learned, for the first time, that it was necessary to use it, provided he exercised it in a reasonable time after receiving such information.

It is contended, that the sheriff, Barton, had no power to give the casting vote, for two reasons: 1. Because there is no statute authorizing him to do so: 2. If there is, such statute is unconstitutional. I will examine the last reason first. The constitution, Art. III., § 5, declares that "every white male person of the age of 21 years or upwards, who shall be a citizen of the United States, and shall have resided in this state one year next preceding an election, and the last three months within the county, city or town in which he offers to vote, shall be deemed a qualified elector." It is insisted in argument, that every citizen of the description contained in this section, has a right to vote; that sheriffs, as well as others, are included; and that to prohibit their voting, except in a particular event, is depriving them of this constitutional privilege.

That this objection is specious, is certain, but I do not think it will bear the test of scrutiny. Constitutions are always intended to lay down general principles, to define boundaries by which the different departments of the government are to be limited, and to secure the great rights and privileges of the people; such, at least, are the objects of our federal and state constitutions. These great principles, thus declared, are to be acted upon by the different departments of the government, and some of them to be brought into active operation by the aid

(Majorities.)

of subsequent enactments of the legislative department. Constitutions are intended to be of a permanent nature, liable to amendment, it is true, yet guarded against the hand which would rashly and inconsiderately make alterations in their provisions. It is obvious, then, that a constitution must be liberally construed, with a view of effectuating the intention of its framers; and that the history of the times in which it was framed, the manner most efficient in securing its objects, the restraints intended to be imposed, and the privileges intended to be granted, must all be taken into consideration in giving a construction to those instruments.

What, then, was the privilege intended to be secured by the 5th section of the third article? Certainly, the right of suffrage to all persons included in its provisions; and it is equally certain, that no department of the government, nor all of them combined, have the power to divest an individual of this right, otherwise than is prescribed by the constitution. Any citizen, however, is authorized to refuse to exercise this privilege; he may do it in various ways; as, by refusing to vote at an election; by voting for only one officer, when he might have voted for five or six; by absenting himself from an election, &c. The right of suffrage, then, is a privilege granted by the constitution to the citizen, intended to secure his own rights; but if the citizen can refuse to exercise this privilege, he may also relinquish it for a time, to secure himself a greater advantage. This may be tested by other provisions of the constitution; the tenth section of the declaration of rights declares that "the accused has a right, in all prosecutions by indictment or information, to a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed;" this has always been considered as securing a privilege to the accused, and that he might, under the statute authorizing a change of venue, relinquish this right and be tried elsewhere. So, if the general assembly declare that no sheriff shall vote at an election, except in case of a tie, it deprives no man of his

(Majorities.)

privilege; for no man is bound to become a sheriff; but if he do become one, he, for the time, relinquishes the right of suffrage, to be exercised only in the excepted case, for which he receives a greater good. He does this too, with the view, in part, of securing an election, the very object intended to be effected by this provision of the constitution; it is the policy of the constitution that an election should be made by the people, and therefore, an act of the general assembly tending to advance this object would be consonant with the best public policy. Nor does the idea that the sheriff may be authorized to give a casting vote, militate at all against the opinion herein before advanced, that a failure to elect such officer occasions a vacancy in the office; if such provision existed the election would not have been closed, until the sheriff had ascertained the tie, and given his vote.

The position that an officer may be compelled to relinquish a part of his constitutional privileges as a citizen to promote the convenience of the community, was well sustained by the counsel for the relator, in the cases put of clerks, &c., being required to keep their offices at the several places of holding courts of the different counties which necessarily compels them to live there; and to be compelled to reside at a particular place, is as certainly an unconstitutional restriction upon citizens generally as any which can be imagined. Offices are created and officers appointed for the convenience and advantage of the people,\* and so long as these objects are kept in view in legislative enactments with regard to them, their rights are not infringed. The constitutions of all the states prescribe the general qualifications of electors; in several, the sheriff is required, by statute, to give the casting vote and in none, so far as I am informed, has the constitutionality of such a law been questioned. I am, therefore, of opinion, that such a statute would not be unconstitutional.

\* This is one of those old time notions which prevailed in 1829, but practically repudiated in the year of our Lord 1871.

(Majorities.)

I come now to examine, whether such a statute does actually exist in our statute book. To prove that there does, much has been advanced in argument, which would have been sound logic, if addressed to the legislative branch of the government, but which ought not to influence this court in arriving at a conclusion. That such a law would be politic, will not be disputed by me; but because I am of this opinion, it does not follow, that others must agree with me, far less, that I can, for this reason, determine that there is such a law. It has been urged, that the constitution secures the right to the electors of each county, to elect members of the general assembly, sheriffs and clerks, and that unless some person in the county is authorized to give a casting vote, in the event of a tie, there would be a failure to elect, and the office must remain vacant; or the governor may appoint some individual to fill the vacancy, however obnoxious such appointment might be to the people of the county. Receive this argument in all its latitude, and it defeats itself; for it has not been contended by any, that the constitution gives to any person a casting vote to produce a preponderance, when an equal vote has been given for two candidates; but all admit, that if such a power exists, it is conferred alone by the act of 1812 and that of 1819 which recognises it; for, as to the provision in the seventh section of the schedule to the constitution, all agree that it was only intended to provide for the first election under the constitution, and this object being effected, it became a dead letter. Suppose the act of 1812 had been expressly repealed by that of 1819, so far as related to the casting vote of the sheriff, who would then have given such vote? certainly any other citizen would have been equally authorized to do so, with the sheriff. The answer is plain, none would have had such authority; a vacancy would have occurred, not so destructive to the true interests of the people as might be apprehended, as it could at once be filled by the governor of their choice; and after the revo-

(Majorities.)

lution of a few months, the electors of the county would again meet at the polls, either to confirm the appointment made by their chief magistrate, by electing the man commissioned by him, or to put some person in his place, in whom they more implicitly confided.

The decision of this case, then, turns simply upon this point, does the act of 1819 vest in the sheriff the power of giving the casting vote, in the event of an equal number of votes being given to two persons, candidates for the office of sheriff? The third section of that act, which is entitled "an act to regulate elections," &c., declares, "that hereafter the court-house shall be the place of holding general elections in each and every county throughout the state, for the purpose of electing governor, members of congress, members of the general assembly, sheriffs and clerks; the election at the court-house, as aforesaid, shall be holden on the first Monday, and day following, in August in each and every year. The third section provides, "that the elections aforesaid shall be conducted by the sheriff and managers appointed, in the same manner as heretofore by law directed." In order to ascertain the manner in which elections were conducted before the passage of that act, it is necessary to recur to the act of 1812, passed by the legislature of the Mississippi territory, entitled "an act to amend and reduce into one the several acts regulating elections." The fifth section of this act, after specifying the manner in which votes shall be given in, namely, by ballot, &c., proceeds thus: "but when two persons shall have an equal number of votes, the returning officer shall have the casting vote, but shall not vote in any other case whatsoever." At that time, members of the house of representatives were the only officers elected by the people.

Does this provision, for deciding in the event of a tie, form a part of the "manner of conducting the election?" If it does, then the relator was duly elected; if it does not, then he was not. There is certainly a great distinc-

(Majorities.)

tion between the manner of conducting an election, and the election itself; by "the manner of conducting the election," I understand the formal part of the election, namely, the mode of voting, the mode of receiving and registering the votes, of computing them, &c.; the word manner has never been considered as including substance, but form only, and the word conducting, certainly, cannot be synonymous with effecting. Now, the giving a casting vote is clearly not a part of the "manner of conducting," but it is effecting the election; the qualifications of the electors, is substance, the manner of determining upon those qualifications, is form; under the provision which we are considering, it devolved upon the managers to determine whether the voters possessed the necessary qualifications to vote; but the law must definitely prescribe those qualifications. In the event of a tie, the giving of the casting vote is as substantial a part of the election, and more so, if possible, than the qualifications of the electors; it is so far from being the manner of conducting the election, that it is absolutely making the election. When the polls are closed, and the votes are counted, the sheriff and managers have completed their duty as respects the manner of conducting the election; and if no election of any officer is effected, by reason of a tie, and any individual is authorized then to vote, he is as completely the elector, as if no other person had been permitted to vote at all. This is placing in the hands of the sheriff a great and important privilege, too important, I conceive, to be given by mere implication, unless it was necessary to the security of some great interest; I believe, therefore, that the power of the sheriff to give such vote, ought not, and legally cannot, be extended by implication; and that therefore, he has not the power to give the casting vote, except in the instance expressly provided for, viz: in the event of a tie between candidates for the house of representatives; and that the argument *ab inconvenienti* cannot, in this instance, be permitted to weigh with the court.

(Majorities.)

The practice of extending statutes far beyond their legitimate meaning, indeed, of often giving them a construction directly in opposition to the plain intention of those who made them, has been in many instances carried to a most unwarrantable length. That statutes, which have in view the remedy of a particular mischief, should be construed by the courts so as to carry that intention into effect, is, in the general, a plain proposition; but when the formal mode prescribed for carrying into execution the provisions of one statute, is recognised and prescribed as the mode of carrying into execution the provisions of another, to determine that all the substantial enactments of the first are included in the last, might produce much confusion. Nor can I perceive the necessity for these extended constructions; did our general assembly meet but once in some dozen years, the argument *ab inconvenienti* would possess great force indeed; but when there are annual sessions, surely it is safer and more becoming in the judicial tribunals, rather to suggest to this more immediate organ of the people, the amendment which they consider politic, than to make it themselves.

I consider the policy upon which our happy institutions are based, of keeping separate and distinct the three departments of the government, as the one best calculated to secure the permanence of our liberties; and while I would watchfully guard against the encroachment of the executive or legislative departments upon the independence of the judicial, I would be equally vigilant not to pass the boundary laid down for me as a judge. While all shall act in this way, we shall move on harmoniously, and the great object of the constitution, the security of the people's rights, will be perfectly effected.

I consider it unnecessary to dwell upon the consequences produced by the announcement made by the sheriff, Barton, that the relator was duly elected; this could have no possible effect. If he had received a minority of votes, this declaration could not make him a sheriff, either *de facto* or *de*



(Majorities.)

*jure*; if he had received a majority, he was entitled to the office, whether declared so or not. I am of opinion, the judgment should be affirmed, and of this opinion are a majority of the court.

LIPSCOMB, J. I have not formed an opinion on the point, whether the act of 1812 was abrogated or not, by the constitution; but I most fully concur in the construction given to that act in the above opinion.

Judgment affirmed.

SAFFOLD, J., dissented.

---

An election is in all cases determined by a majority of the legal votes actually polled; those who do not attend and exercise the privilege of voting are presumed to concur with the majority of the actual voters. *Louisville and Nashville Railroad Co. v. County Court of Davidson*, 1 Sneed 638. So, it has been held, that where a proposition was directed to be submitted to a two-thirds vote of the qualified voters of the city, to be sufficient that two-thirds of the actual voters were in favor of the question submitted. *State v. Renick*, 37 Mo. 270. But where an officer is to be elected by two-thirds of the voters present at a meeting, if there be twenty-two corporators present, and eleven vote for one candidate and ten for another, the chairman not voting, there is no election; for the chairman, being present, ought to vote, and is to be considered a voter present at the election, in order to determine whether either candidate had a majority of the votes. *Regina v. Guardians of St. Martin's in the Fields*, 5 Eng. L. & Eq. 361.

Under a law authorizing the election of two commissioners, an election was held, but it was conducted in all respects as if one only was to be chosen; two persons were opposing candidates, and each elector voted for one of the two, but in no instance did a ballot contain more than one name for the office; and it was held, that only the one who received the highest number of votes was chosen, and that as to the other, there was a failure to elect, and the office remained vacant. *People v. Canvassers of Kent County*, 11 Mich. 111. In case of a tie vote, a new election will be ordered. 5 Votes of Assembly 435.

(Duties of return judges or canvassers.)

It has been held, in the general assembly of Pennsylvania, that where the vote stood 16 yeas to 15 nays, the speaker had no right to vote; it being his duty to be indifferent between the parties. 4 Votes of Assembly 330-37. But the modern practice in the United States is otherwise, although the Pennsylvania precedent agrees with the parliamentary usage of Great Britain.

---

## STATE v. STEERS.

In the Supreme Court of Missouri.

MARCH TERM 1869.

(REPORTED 44 MISSOURI 223.)

[*Duties of return judges or canvassers.*]

Canvassers are mere ministerial officers; it is their duty simply to cast up the votes and award the certificate to the person having the highest number; they have no judicial power.

This was an information in the nature of a *quo warranto*, filed by the attorney-general to inquire by what title the defendant, John H. Steers, claimed to exercise the office of sheriff of Ralls county.

*Johnson*, attorney-general, and *Shields*, for the relator.

*Dryden*, *Lindley* and *Dryden*, for the defendant.

WAGNER, J., delivered the opinion of the court. The attorney-general, on behalf of the state, appears and files an information in the nature of a *quo warranto*, in which, among other things, he states that at a general election held in this state, on the third day of November 1868, in the various counties, for state and county officers, one Samuel C. McCune, and the defendant John H. Steers, were

(Duties of return judges or canvassers.)

candidates, and the only candidates, in the county of Ralls, for the office of sheriff of said county; that McCune received a majority of all the legal votes cast for that office, in the said county, at that election, and that the judges and clerks of election in the various election districts in such county so certified to the county clerks of said county; that notwithstanding the fact that McCune received the majority of all the legal votes cast for the office of sheriff, the county-clerk and board of county-canvassers, unlawfully and wrongfully, for alleged informality and illegality, rejected and refused to count the votes, as certified by the judges and clerks of election, cast for said office in Jasper election district in said county; the said defendant, Steers, by the said illegal and wrongful action of the county-clerk, in refusing to count and take into consideration the said votes and poll-books of Jasper election district, illegally obtained from the county-clerk of such county his certificate of election, and on the said certificate of election, the governor of the state issued his commission to the defendant, as sheriff of said county, under which commission the said defendant now holds and executes the duties of the said office of sheriff. The information then specifies the number of votes given, showing that, upon a counting of the whole vote of Ralls county, McCune was legally elected, and that by the act of the clerk in throwing out the vote of Jasper election district, the result was changed and a majority left for the defendant. A judgment of ouster is demanded against the defendant, for the reason that he is usurping and exercising the duties of an office to which he has no just or legal claim.

The defendant, in answer, sets up the plea that, at the regular election, in 1866, he was a candidate for the office of sheriff, in Ralls county, and was duly elected; that he received a certificate of such election from the clerk of the county court of said county, and that thereon he was duly commissioned by the governor to serve for two years, and

(Duties of return judges or canvassers.)

until his successor should be duly elected and qualified; and the defendant further alleges that, in pursuance of his said election, in 1866, and by authority of the said commission, he accepted the said office of sheriff, and still holds and executes said office, no successor to the defendant, in said office, having been duly elected and qualified, and the defendant not having been removed for malfeasance.

Upon these pleadings, the case stands in this court; the information expressly alleges that the defendant is holding and exercising the functions of the office, by virtue of the election of 1868, and in consequence of a certificate wrongfully issued by the clerk of the county court, upon which a commission was issued. There is no express denial of the averment, but there is an answer (argumentative, evasive and negative in its character) stating that the defendant holds said office, no successor to him having ever been elected and qualified. The information is a pleading which must be answered or demurred to, and it has been decided, that the general rules of pleading are applicable to proceedings upon an information in the nature of a *quo warranto*. *People v. Clark*, 4 Cow. 95; *State v. Bernoudy*, 36 Mo. 279; *State v. Messmore*, 14 Wis. 115. The evasive answer, that no successor to the defendant had ever been qualified, is full of duplicity, and may be construed to mean, that he holds under either election, no other person having succeeded him in the office. The allegation in the information is a plain, simple one, requiring a denial, which the defendant has not seen proper to make.

A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office, without having been legally elected, it is an unlawful holding, and he may be ousted at the instance of the state, notwithstanding his commission. *Attorney-General v. Barstow*, 4 Wis. 567. In the case of *People v. Van Slyck*, 4 Cow. 297, it was determined,

(Duties of return judges or canvassers.)

that an information in the nature of a *quo warranto* would lie against one intruding into the office of sheriff, in consequence of an unlawful decision of the county-board of canvassers, the duties of the board being ministerial, and not judicial. It is true, that by force of existing law, the officer holds until his successor is elected and qualified; but if, by unlawfully obtaining his certificate and commission, he prevents the person legally entitled thereto from qualifying, he will not be allowed to set this up in defence, and reap a benefit from his own wrong.

The question then arises, by what authority did the county-clerk, acting as a mere canvassing officer, assume to determine the legality of the vote in the Jasper election district? Although the vote might have been informally certified, that would make no difference; officers should look at substance, and not at form. A literal compliance with the prescribed forms is not required in any case, if the spirit of the law be not violated; and the governing principle in all cases is, to clearly ascertain the intention of the voters; if a defect existed in the certificate, that might be supplied at any time, by the judges and clerks, whose duty it was to make the same before the vote was counted.

The statute requires that, within eight days after the close of each election, the clerk of each county court shall take to his assistance two justices of the peace of his county, or two justices of the county court, and examine and cast up the votes given to each candidate, and give to those having the highest number of votes a certificate of election. Gen. Stat. 1865, p. 63, § 25. Here is no discretion given, no power to pass upon and adjudge whether votes are legal or illegal, but the simple ministerial duty to cast up, and award the certificate to the person having the highest number of votes; if the clerk has sufficient mathematical ability to correctly count up the returns, he is perfectly qualified for his office, for that is the only duty devolved upon him by law. To determine upon the

(Duties of return judges or canvassers.)

legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims. To admit a mere ministerial officer arbitrarily to reject returns, at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard; a thing which the law abhors and prohibits. Admit the power, and there will be no uniformity; one canvassing officer will reject for one thing, and another for a different matter; and no man can tell whether he is legally elected to an office, until he consults the notions of a canvasser. The exercise of such a power is subversive of the rights of the citizen, and dangerous and fatal to the elective franchise.

But it is enough to say, that the claim is utterly unauthorized. The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear, and have a fair trial upon pleadings and proof. When a ministerial officer leaves his proper sphere, and attempts to exercise judicial functions, he is exceeding the limits of the law, and guilty of usurpation; in this case, it would have been more decent and seemly for the clerk to have confined himself to the discharge of the duties pointed out by law, and not to have attempted the exercise of powers which were never entrusted to him. I have examined, with a good deal of research, the authorities, and have not been able to find a single one that held otherwise, than that the canvasser acted ministerially, but they are unanimous and decisive, in declaring him a ministerial officer, and nothing more.

The record abundantly shows that the defendant has no legal right to the office which he is now holding, and judgment of ouster will, therefore, be entered against him, with costs.

Judgment for the state.

## (Duties of return judges or canvassers.)

The point ruled in the principal case, that canvassers or return judges are mere ministerial officers, without any judicial power, and that their duty consists in simply casting up the votes returned to them by the election officers, provided the certificates be regular on their face and presented in proper time, has generally been received as law in the state courts. Thus, in New York, in the case of *People v. Van Slyck*, 4 Cow. 297, 323, it was said by Woodworth, J., that "the duties of the canvassers are ministerial; they are required by the act, to attend at the clerk's office, and calculate and ascertain the whole number of votes given at any election, and certify the same to be a true canvass; this is not a judicial act, but merely ministerial; they have no power to controvert the votes of the electors." So, in *Ex parte Heath*, 3 Hill 47, Cowen, J., says, "the returns of election inspectors are ministerial, not judicial acts; their character is shown by the freedom with which they are scrutinized in proceedings by *mandamus*, or information in nature of a *quo warranto*." In *Morgan v. Quackenbush*, 22 Barb. 77, it is said by Harris, J., that "they are not at liberty to receive evidence of anything outside of the returns themselves; their duty consists in a simple matter of arithmetic; they are to bring together the returns made by the inspectors of the several election districts, and ascertain, by computation, the aggregate number of votes given in the whole city for each person, for each office, and then declare the result by their certificate."

The same point was ruled in Pennsylvania, in *Thompson v. Ewing*, 1 Brewst. 77, where it was said by Ludlow, J., that return judges have no power to inquire into a question of fraud, for that would constitute them judges of a contested election; their duty is simply to open and enumerate the returns, cast up the vote, and certify the result according to law. And in New Jersey, in *State v. The Governor*, 1 Dutch. 348-9, Green, C. J., said, "the board of county-canvassers clearly erred in the grounds of their determination; they had no authority to examine the regularity of the proceedings of the township boards, or to look behind the official returns made by them; all the evidence produced before them, outside of the official returns, made or prescribed by law, was unauthorized and illegal; it could constitute no legitimate basis for determination."

In Indiana, it has been determined, that the duties of the board of canvassers and of the clerk, in making out the statement of the votes given, the persons elected, &c., are ministerial; they are not to consider

(Duties of return judges or canvassers.)

any question relative to the validity of the election, but to cast up the votes given for each person, from the proper election documents, and to declare the person who, upon the face of those documents, appears to have received the highest number of votes given, duly elected to the office voted for. *Brower v. O'Brien*, 2 Ind. 423; *State v. Jones*, 19 Ind. 356. In Illinois, it is said, that "these officers are clothed with no discretionary power; they are to open 'the said returns,' and make abstracts of the votes as they appear in said returns, and the clerk is to deliver a certificate of election to each of the persons having the highest number of votes, as manifested by 'the said returns;' they are not allowed to reject any returns, nor to decide upon their validity, if, on their face, they are made in compliance with the law, and in the form prescribed by the statute; if the returns show the whole number of votes given, the names of the persons voted for, and the number of votes given for each, they contain everything that is material, and if duly authenticated, should be received as valid returns." *People v. Hilliard*, 29 Ill. 422; *People v. Kilduff*, 15 Ill. 500. In *People v. Head*, 25 Ill. 328, the court say, "they may probably judge whether the returns are in due form, but after that, they can only compute the votes cast for the several candidates and declare the result."

The same point was determined in Iowa, in *Dishon v. Smith*, 10 Iowa 212; *State v. Cavers*, 22 Iowa 343: and in Wisconsin, in *Attorney-General v. Barstow*, 4 Wis. 749, where it is said, that the canvassers "are to add up and ascertain, by calculation, the number of votes given for any office; they have no discretion to hear and take proof, as to frauds, even if morally certain that monstrous frauds have been perpetrated." And see *Carpenter v. Ely*, *Ibid.* 420 (ante 258). The law is the same in Michigan, *People v. Van Cleve*, 1 Mich. 362: in Alabama, *Thompson v. Circuit Judge of Mobile*, 9 Ala. 338: in Missouri, *Mayo v. Freeland*, 10 Mo. 629; *State v. Harrison*, 38 Mo. 540; *State v. Rodman*, 43 Mo. 256: in Maine, *Bacon v. York County*, 26 Maine 491: in Minnesota, *Taylor v. Taylor*, 10 Minn. 107; *O'Farrall v. Colby*, 2 Minn. 180: and in Tennessee, *Marshall v. Kerns*, 2 Swan 68.



## HADLEY v. CITY OF ALBANY.

In the Court of Appeals of New York.

SEPTEMBER TERM 1865.

(REPORTED 33 NEW YORK 603.)

[Returns.]

The common council having once legally canvassed the returns of the election for mayor, have exhausted their power, and cannot subsequently reverse their decision by making a different determination.

The effect of the returns is not open for consideration in a collateral proceeding, in which the title of the officer is in question.

This was an action by James Conlon to recover his salary, as a policeman, for part of the year 1857; the plaintiff having died, *pendente lite*, Hadley, his assignee, was substituted. The defence was, that Conlon had been removed from office, by John V. P. Quackenbush, as mayor, together with the recorder and an alderman of the city. The question was, whether Mr. Quackenbush was legally the mayor; the plaintiff contending that Eli Perry, and not Quackenbush, was mayor.

It appeared on the trial, that on the 15th April 1856, the common council of Albany determined that Eli Perry was duly elected mayor for the term of two years, at an election held on the 8th inst.; that a certificate of election had been issued to him, under the seal of the city, authenticated by the clerk of the common council, whereby it appeared that Eli Perry had a plurality of all the votes cast, and that J. V. P. Quackenbush had the next largest number of votes; and that Perry had qualified and entered upon the discharge of the duties of his office. The defendants offered to prove a canvass of the returns of the recent charter-election, at a subsequent meeting of the common council held on the 6th May 1856; which was objected to, on the ground that the new council had no power to re-

(Returns.)

canvass the returns; this objection was sustained by the court. The defendants then offered in evidence the returns of the inspectors of election, which were objected to, on the ground that the certificate of election could not be controverted; the court sustained this objection; and to these rulings the defendants' counsel excepted. There was a judgment for the plaintiff which, having been affirmed at a general term, the defendants prosecuted this appeal.

*Hand*, for the appellants.

*Hadley*, appellee, *in propria personâ*.

DENIO, C. J. There being no conclusions of fact found by the judge, the only questions which are open for examination upon this appeal, are those which arise upon the exceptions to rulings taken in the course of the trial.

The election for mayor and officers, in 1856, was held on the day appointed by law, the second Tuesday (8th day) of April, and the terms of the newly-chosen officers commenced on the first Tuesday of May thereafter. Laws 1855, ch. 196, §§ 1-3. The law requires the inspectors of election to file a statement and certificate, setting forth the number of votes given for each person, for each respective office, with the clerk of the common council, within twenty-four hours after the completion of the canvass, and that "the common council, at its meeting thereafter, shall canvass such returns, and determine and declare the result." Laws 1855, ch. 86, § 11. The officers chosen are, on or before the time when their terms commence, to take the oath of office prescribed by law. *Ibid.*, § 12. The plaintiff had given in evidence a certificate of the determination of the common council, at a meeting held on the 15th April, one week after the election. This was, at least, *primâ facie* evidence of the act of the common council; the document was given in evidence without objection, and it was not attempted to controvert the fact, that the proceedings of the council, set forth in it, had

(Returns.)

taken place as stated. But the defendants offered to prove another canvass before the common council, at a meeting on the 6th May following; it is not stated in the offer, nor mentioned in the case, that the new canvass resulted in electing Mr. Quackenbush; but such, I suppose, was the intention of the offer; the evidence was excluded, and this is the point of the first exception.

The act does not prescribe that the canvass shall be made at the first meeting of the council after the election, a word having apparently dropped out in transcribing or printing the section; the meaning, as it stands in the statute-book, is, that the canvass shall be made at some meeting of the common council after the election; it was regular and legal to perform that duty, at the first meeting, and this was what was done, as stated in the certificate. Having been once legally performed, the power of the council was exhausted; the board had no power to reverse its decision, by making a different determination. The court was, therefore, right in rejecting the evidence which was offered.

The second exception was, to the decision by which the court excluded the inspectors' returns; the object, I suppose, was, to show that the returns elected Mr. Quackenbush and not Mr. Perry. But the law having committed to the common council the duty of canvassing the returns and determining the result of the elections from them, and the council having performed that duty and made a determination, the question as to the effect of the returns, was not open for determination by a jury, in an action in which the title of the officer came up collaterally. If the question had arisen upon an action in the nature of a *quo warranto* information, the evidence would have been competent; but it would be intolerable, to allow a party affected by the acts of a person claiming to be an officer, to go behind the official determination, to prove that such official determination arose out of mistake or fraud.\*

\* See *Peyton v. Brent*, 3 Cr. C. C. 424; *Hunter v. Chandler*, 45 Mo. 453.

(Returns.)

It follows, that the remaining exception was not well taken; the court excluded the determination to remove Conlon, made at a meeting consisting of Mr. Quackenbush, acting for that purpose as mayor, and the recorder and an alderman. The mayor is an essential member of the council provided for hearing charges against a policeman, unless he be absent, in which case, the chief of police is to take his place; Mr. Quackenbush was not the mayor, and consequently, no legal body for hearing these charges, was assembled; the act of removing Conlon was consequently void, and he was not removed; the papers which were offered were properly rejected.

It seems probable, that the action might have been successfully defended, on the ground that Conlon had failed to perform the duties of his office, and had acquiesced in the irregular order for dismissal which had been made; it seems, he admitted himself to be guilty of the charges brought against him, and there is an inference that he retired from the police, arising out of the want of any proof or allegation of a subsequent performance of duty, as a policeman. But there is no finding of facts to raise that question; the defendants' counsel seem to have chosen to place their defence upon the title of Mr. Quackenbush to the office of mayor, and they raised no question except that which related to the evidence of his election, and the validity of his acts; having failed to sustain their position on these questions, they cannot ask to have the judgment against them reversed.

BROWN, J. James Conlon, the plaintiff's assignor, was one of the policemen of the city of Albany, duly appointed on the 9th April 1856, to serve for the term of two years from the 20th May thereafter, and until his successor should be appointed, or he was removed for cause. The exception to the proceedings at the circuit, was one taken to the rejection of the defendants' evidence, and it presents the principal question upon which the

(Returns.)

plaintiff's right to maintain the action depends. By the 11th section of the act of 4th April 1851, the inspectors, at an election for municipal officers in the city of Albany, shall certify and declare the result of the canvass of the votes, and file such certificate and statement in the office of the clerk of the common council, within twenty-four hours after the completion of the canvass, and the common council, at its meeting thereafter, shall canvass the returns and declare the result. There was an election for mayor and other officers, in the city, on the 8th April 1856, and for the purpose of showing who was duly elected mayor, the plaintiff produced and proved the certificate of the members of the common council, dated the 15th April 1856, declaring that Eli Perry, having received the greatest number of votes, was duly elected; this certificate was in due form, and was produced from the files of the clerk of the common council. It was then proved, that Eli Perry qualified and entered upon the duties of his office, as mayor.

Policemen are removable from office, for cause shown, by the mayor, and in his absence, the chief of police, and the recorder and one alderman, who are to examine the charges, hear evidence, &c., upon both sides, and acquit, remove or suspend, in their discretion. The defence was, that Conlon had been removed from his office, for drunkenness and misconduct, after a trial before the mayor, recorder and alderman Benson, on the 6th November 1856, at which Conlon appeared, and was heard in his defence. To lay the foundation for this defence, the defendants offered evidence to show that, on the 6th May, some time after Eli Perry was declared duly elected, the common council of the city made another canvass of the votes, and filed another certificate, in which it was declared that John V. P. Quackenbush was duly elected mayor, &c. This evidence was, upon objection, rejected and the defendants excepted. An offer was then made, to read in evidence the returns of the canvassers and inspectors for the elec-

(Returns.)

tion on the 8th April 1856, for the purpose of showing that John V. P. Quackenbush had the greatest number of votes for the office of mayor, at the election. This evidence was also rejected, upon objection, and the defendants again excepted. The defendants' counsel next offered in evidence, the return of a trial of Conlon, upon the charge of drunkenness and misconduct, by John V. P. Quackenbush, acting as mayor, recorder Paddock, and one of the aldermen of the city, Conlon's plea of guilty, and his dismissal from office, by such city officers. This evidence was objected to and rejected, and the defendants excepted.

The legality of the trial of Conlon, and the judgment of dismissal said to have been rendered against him, depended upon the question, who was the mayor of the city at the time, and the effort of the defendants was, to show that Quackenbush was the mayor, at the time of the alleged trial; the defendants claimed that, notwithstanding Perry had obtained the canvassers' certificate, Quackenbush really had the most votes, and was entitled to the office. The judge decided that mayor Perry's title to the office could not be the subject of investigation and inquiry in this action, and on that account rejected the evidence. This was entirely right; Eli Perry had the certificate of the canvassers, the authority appointed by law to examine the inspectors' returns, and determine who had the most votes and the right to the office; he was, therefore, mayor *de facto*, and notwithstanding John V. P. Quackenbush might have received the greatest number of votes, and be rightfully entitled to the office, yet, wanting the certificate, he was not, for the purposes of the trial and dismissal of Conlon, the mayor of the city; and the proceeding upon which the defendants relied, to show that Conlon was not a policeman, at the time the service, for which he claimed compensation, was rendered, was *coram non judice* and void. The judgment should be affirmed.

Judgment affirmed.

## (Returns.)

That the power of the canvassers over the returns of the election, is exhausted, when they have once announced the result, and given their certificate to the successful party, seems to be generally conceded. The same principle was decided by the supreme court of New York, in *Hartt v. Harvey*, 32 Barb. 55; and in *State v. Warren*, it was decided, in Delaware, that where no certificate or other formal mode of making known to a person his election to a public office, is required by law, the result of the election, as ascertained and announced at the close thereof, is conclusive upon the election officers, and cannot afterwards be reconsidered or varied by them. 1 Houst. 39. In Louisiana, where an election was contested upon the ground, that after the commissioners had made their return, they proceeded to count the votes over again, and found there was a difference which would have changed the result, it was held, that as it did not appear that the mistake was committed on the first, any more than on the second counting, full effect must be given to the official returns. *Ramsey v. Callaway*, 15 La. An. 464. And see *Bowen v. Hixon*, 45 Mo. 340.

The certificate of the board of canvassers is conclusive of the election of the officer, in a controversy arising collaterally, or between the party holding it and a stranger; but between the people and the party, in an action to impeach it, it is only *prima facie* evidence of the right. *People v. Cook*, 8 N. Y. 67; *People v. Vail*, 20 Wend. 12. The same principle was determined by the supreme court of California, in *People v. Jones*, 20 Cal. 50; and in Pennsylvania, in *Commonwealth v. County Commissioners*, 5 Rawle 75.

## HULSEMAN v. REMS.

In the Supreme Court of Pennsylvania.

OCTOBER TERM 1861.

(REPORTED 41 PENNSYLVANIA STATE REPORTS 396.)

*[Effect of certificate.]*

Where the return judges have given certificates of election to the persons appearing to have the highest number of votes, in the absence of proof that they acted fraudulently, the courts will not summarily interfere, by injunction, though it be evident that some of the returns were forgeries, and that through them several of the candidates had improperly obtained certificates of their election ; it is a case to be tried by the proper tribunal appointed for the determination of contested elections.

This was a bill for an injunction to restrain the defendants from using a certificate of election which had been issued to them, as members of the common council of the city of Philadelphia, on the ground that the return judges had met at an unusual place and that they had counted, among the returns, certain fraudulent and forged certificates, purporting to be returns of the votes cast by certain military companies in the service of the United States.

*Hirst*, for complainants.

*Briggs*, for the defendants.

LOWRIE, C. J., delivered the opinion of the court. The law providing for the voting of soldiers, who are away from their homes in actual service,\* so clearly covers, by its terms, the case of municipal elections, which are held at the same time as the general election, that we are unable to find any argument that is at all satisfactory, for

\* *Chase v. Miller*, which held this law to be unconstitutional, had not then been decided.



(Effect of certificate.)

excepting the late municipal election of Philadelphia out of its operation. We must, therefore, declare that the soldiers in camp had a right to vote for their proper municipal officers at home, and to have their votes counted on the second Tuesday of November, if they were properly certified and returned. It was, therefore, the duty of the judges of the 19th ward to meet on the second Tuesday of November, so as to include in their enumeration, such returns of the votes of the soldiers as should be properly certified to them, and this, whether they had a regular adjournment for that day or not. They did meet on that day, and include in their enumeration the votes of the soldiers, issued certificates to those candidates who, by the votes thus included, appeared to have been elected; and now we are asked to declare those certificates illegal, fraudulent and void, to enjoin the defendants from using them, and to require them to be delivered up and cancelled.

Possibly, some of the camp returns, or pretended returns, had obtained so bad a reputation by the public examination which had been had of them before the court of common pleas, that judges who were carefully honest, would have discovered very clear reasons for rejecting them; but, even if we have authority for examining this matter, we have no convincing proof that the return judges acted fraudulently in receiving these returns. They seem to have had formal certificates of them, and they may have committed a mistake, rather than a fraud, in not duly inquiring of the channel through which those certificates were received, and may very honestly have concluded that they had no authority to inquire into the authenticity of papers which came into their hands in proper form. We find fraud enough in these camp returns, without taking suspicions for evidence or proof of it, and without condemning those against whom the evidence is incomplete.

It is alleged, that on the second Tuesday of November,

(Effect of certificate.)

some of the return judges refused to meet, and that those who did meet, met at an unusual place, to count the soldiers' votes and to issue the certificates; but the affidavits of the defendants seem to us sufficiently to account for this, by showing that the duties of the return judges were so interfered with, by a disorderly crowd, that they could not be performed at the usual place.

We have, therefore, no ground left for our interference, but the single one, that the return judges included in their enumeration, returns purporting to be from three companies of volunteers, which were forgeries. We admit that, in the evidence before us, it appears clear to us all, that those returns are forgeries, and that it was only by their inclusion in the enumeration, that the defendants have obtained certificates of their election. We admit, therefore, that the evidence proves that these certificates of the election of the defendants are founded in manifest fraud, the forgery of some unknown person, but we do not find that the defendants had any hand in it, and we trust they had not. Can we, on this account, interfere and declare the certificates void? We think not. According to our laws, the election has passed completely through all its forms, the result has been, in due form, declared and certified, and the defendants have received their certificates of election and are entitled to their seats as members of the common council. The title-papers of their offices are complete, and have the signatures of the proper officers of the law; and if they are vitiated by any mistake or fraud in the process that has produced them, this raises a case to be tried by the forms of a "contested election," before the tribunal appointed by law to try such questions, and not by the ordinary forms of legal or equitable process before the usual judicial tribunals. It is part of the process of political organization, and not a question of private right, and therefore, the constitution does not require that the courts shall determine its validity.

The law has appointed a special tribunal to try just such

(Effect of certificate.)

a question as this, and we can have no right, to step in between the case and that tribunal, and alter the return of the election judges and annul their certificates. Plain as the fraud appears, and earnestly as we condemn it, as citizens, it is no part of our functions as a court to sit in judgment on it. The common council is the proper tribunal to try cases of contested elections relative to its own members, and there the fraud and forgery must necessarily be tried and decided with final effect; they are appointed by law to try the whole case, and they alone can try it. We decided this, last year, at Philadelphia, in the case of the *Commonwealth v. Baxter*, 35 Penn. St. R. 263, a case from Bradford county, where a commissioner of highways had received a regular certificate of election, and where we decided that it could be avoided only by the regular process of a contested election case. Perhaps, that case may be found worthy of examination.

If, in this way, we suffer a gross fraud to pass through our hands without remedy, it is not because we have any mercy for the fraud, but because we cannot frustrate it by any decree of ours, without an act of usurpation; another tribunal is appointed to administer the remedy, and we believe that, on proper application, it will administer it rightly, according to the evidence it may have; and if we had any doubts of this, we should still not be justified in interfering. Sad indeed, very sad, has been our recent experience of election frauds; but we cannot believe that our partisanship has become so reckless, and our elective franchise so carelessly exercised, and our thirst for office and power so intensely selfish, that any official body will sanction so base and frightful a fraud upon the public, as this now appears, or that any man deemed worthy of an office would accept it under such circumstances.

It is suggested, that there is danger, if we do not interfere, that this fraud will be persisted in by the defendants, and adopted by their co-partisans, and will be resisted by riotous violence. Possibly this may be so; for,

(Effect of certificate.)

when public forms of proceeding are tainted with known fraud, public or common sense cannot help regarding the sanction of them as a mere exercise of force, without right, and then riotous resistance becomes probable, where the public take great interest in the matter; as violence is very apt to beget violence. God save our country from this additional degradation! The violence of partisan strife has already humiliated us much; let not fraud and force be met by riot now and here; rouse by violence the passions of men, and the contested election case will become a trial of opposing parties, and not of the truth of the case. Silence the passions, and let truth have a chance to present her claims to quiet reason; let stillness or the quiet force of relevant testimony rule the time that intervenes between now and the decision of the contested election, and the decision will be right. No man of sense, much less of conscience, will dare to stand in broad open day, before high Heaven, and before the honest conscience of the country, and sanction this forgery, if the evidence be then as it now is; none such will desire to do it. But if his judgment be beclouded by the passions of opposing popular parties, and he be forced to assert his courage rather than the truth, then the rights of justice will be insecure.

It is a sore affliction to us, to witness these disorders of our country; we cannot help reflecting, whither do they tend? and we wish that all others would think of this, that we may find a proper political remedy. Our selfish assertion of our *rights*, and neglect in studying our *duties*, may have much to do with them. Our elections have become so intensely selfish, that opposing parties treat each other as enemies, and thus many on each side will come to think that tricks and lies, fraud, forgery and perjury are legitimate strategy; and candidates are very apt to be selected, not because of their honesty, or their competency for the office, but of their capacity to lead in an election combat, and of their readiness to reward their

(Effect of certificate.)

assistants at the expense of the public. When elections are conducted, in any large degree, on such principles, they become a form of civil war, repeated annually by appointment of law, and tending to substitute anarchy for law; for a while it is a question which party shall assemble the most *voters*, honestly or dishonestly, by fair argument or by lying charlatanism; but soon it becomes a question which party can force the *election returns* to count the highest numbers, and then forgery and perjury lend their assistance. This is a frightful stand-point to occupy for a look into the future; we shall not attempt to report its revelations.

Injunction refused.

---

In *Miller v. Lowry*, 5 Phila. 202, the court of common pleas of Philadelphia, disregarding the decision of the supreme court in *Hulseman v. Rems*, enjoined the party who had received a certificate of election, from using it, on the ground of fraud. This, however, would appear to be in conflict with the whole current of authorities; in *Commonwealth v. Baxter*, 35 Penn. St. R. 263, it was decided, that a certificate of election is legal and *primâ facie* evidence of title to the office, which can only be set aside by proceedings for a false return. The same point was decided in *Kerr v. Trego*, 47 Penn. St. R. 292; and in *State v. Churchill*, 15 Minn. 455. So, in *State v. The Governor*, 1 Dutch. 331, the supreme court of New Jersey held, that where the governor is required by law to issue a commission, in accordance with the determination of the board of county-canvassers, the court will not award a *mandamus* directing a commission to be issued in conflict with such determination, although it appear affirmatively that the decision of the board of canvassers was based upon illegal evidence, and is contrary to the truth of the case. The certificate, whether rightfully or wrongfully given, confers upon the person holding it the *primâ facie* right to the office, until overthrown by a judicial determination against him. *People v. Miller*, 16 Mich. 56; *Territory v. Pyle*, 1 Oregon 149; *Crowell v. Lambert*, 10 Minn. 369; *State v. Sherwood*, 15 Minn. 221; *State v. Churchill*, *Ibid.* 455. If, however, the certificate, upon its face, recite facts upon which the canvassers rely as their justification and authority for giving it, and

(Requisites of a petition to contest an election.)

these facts show that the holder was not duly elected, it may be disregarded. *Hartt v. Harvey*, 32 Barb. 61.

Although no certificate or other formal mode of making known to a person his election to an office be prescribed or required by law, the result of the election, when ascertained and announced by the election officers, is final and conclusive, and cannot be reconsidered or altered by them. *State v. Warren*, 1 Houst. 39. But the determination of the canvassers has no such final effect, as to interfere with a full investigation of the result of the election, upon a writ of *quo warranto*. *State v. Clerk of Passaic County*, 1 Dutch. 354. And see *Commonwealth v. County Commissioners*, 5 Rawle 75.

---

## SKERRETT'S CASE.

In the Court of Common Pleas of Philadelphia.

SEPTEMBER TERM 1845.

(REPORTED 2 PARSONS 509.)

[*Requisites of a petition to contest an election.*]

A petition complaining of an undue election and return, must set forth the facts, with precision; and they must be sufficient, if sustained by proof, to render it the duty of the court, either to vacate the election, or to declare that another person than the one returned, was duly elected.

Unless the petition be thus specific, and set forth facts that, if true, would have changed the result, it will be quashed, on motion.

Mere irregularities, on the part of the election officers, will not vitiate the poll.

This was a petition complaining of an undue election and false return of David C. Skerrett, for the office of prothonotary of the District Court. The respondent's counsel moved to quash the petition on the ground that it contained no such sufficient allegations and specifications as would justify the court in setting aside the election.

(Requisites of a petition to contest an election.)

*John W. Ashmead*, for contestants.

*H. M. Phillips*, for respondent.

KING, P. J., delivered the opinion of the court. Thirty or more qualified electors of the city and county of Philadelphia have filed their petition, in what they suppose to be the form prescribed by the act of 2d July 1839, complaining of the undue election and false return of David C. Skerrett, as prothonotary of the district court, at the general election of October last. A motion has been made, on behalf of Mr. Skerrett, to quash the petition and proceedings consequent upon it, on the ground that it wants precision and directness. The respondent assumes the position, that the court cannot, under a sound and practical construction of the act of assembly, entertain such a petition, unless it contain some precise allegation of fact which, if sustained by proof, would be sufficient to vacate the return; and that mere general allegations that the party returned as elected was not duly elected, and that the return declaring him elected is untrue, false and fraudulent, afford no basis for the court to proceed in the investigation. On the contrary, the petitioners insist, that general allegations of an undue election and false return, are all that is required by the letter of the law, to authorize the inquiry demanded, and that, at all events, the specifications of irregularities and illegalities, said to have been perpetrated at this election, as set forth in the petition, taken in connection with the general allegations contained in it, exhibit such a case as requires the court to permit the investigation to proceed.

The case is interesting, not only from its subject-matter, affecting, as it does, one of the most important relations of our political system, but from the manifest necessity existing, that the true rule regulating such proceedings should be defined, so as to advance, on the one hand, substantial and meritorious, and to arrest, on the other, futile and

(Requisites of a petition to contest an election.)

querulous complaints. He has been but a casual observer of the disturbing influences of human passions, who will not admit that if one thing is more required than another to rest on solid, tangible and practical principles, it is the class of inquiries like the present, that spring up amidst the fiercest excitements and most vehement feelings, which men, living under such a government as ours, are the subjects of. Should too ready an ear be lent to such complaints, it does not require the spirit of prophecy to divine, that elections will rarely terminate with the ordinary functionaries under whose superintendence they are placed; but that courts of justice will be perpetually invoked to assume the office most foreign to their organization—that of umpires between the contestants for public favor at the ballot-box. Where everything is to be gained, and nothing to be lost, it will require more philosophy than ordinarily belongs to a discomfited party, to resist the temptation of an appeal from a decision against them at the polls, if such an appeal be afforded, on a complaint so vague and indefinite as to offer no shock to the most tender conscience.

For the greater simplification of the precise question for decision, we will first refer to the law, whose application the petitioners invoke: secondly, we will inquire what is its true construction, intent and meaning: thirdly, whether the petition before us is in conformity with these, or otherwise. The conclusion arrived at from these premises results in the decision of the case.

The jurisdiction of this court in the premises is derived from the fifth section of the act of 1839, regulating the election of prothonotaries, clerks, &c. By this section it is enacted, “that the returns of the elections under this act shall be subject to the inquiry, determination and judgment of the court of common pleas of the proper county, upon complaint, in writing, of thirty or more of the qualified electors of the proper county, of undue election or return of any such officer, two of whom shall take



(Requisites of a petition to contest an election.)

and subscribe an oath or affirmation, that *the facts set forth in such complaint* are true, to the best of their knowledge and belief; and said court shall, in judging concerning such election, *proceed upon the merits thereof*, and shall determine finally concerning the same, according to the laws of this commonwealth."

From this source all our authority over the subject is derived; we possess no inherent power in regard to it. It is in the direct powers granted to us by this law, or in the necessary implications arising from such granted powers, that all our jurisdiction resides. And here is seen the inaptitude of the legislative precedents, state and national, that have been so zealously urged upon us by one of the counsel for the petitioners; congress and the state legislature have an inherent and fundamental right to judge of the qualification of the members of their respective bodies; this right is not given by law, but is part and parcel of the very organization of those governments: hence, when in possession of a petition complaining of the undue election of one of their returned members, they may conduct the investigation *pro re nata*. Although they should entertain a general complaint of undue election or return, they may, before proceeding to an investigation, demand of the complainants a specification of the grounds on which they seek to vacate the return; and this, we are informed by the learned counsel, is the actual practice of congress. We, however, have a more limited charter in the election contest made subject to our revision; our authority is derived from express and written law, and unless parties complainant bring themselves within the requirements of this law, we are powerless.

The question, what are these requirements? brings us to the second division of our subject. The complainants take the broad ground that, inasmuch as the words of the act give us jurisdiction on a complaint of "undue election or return," a petition is sufficient, if it contain these allegations, and no more. The vice of this argument

(Requisites of a petition to contest an election.)

consists in confounding the conclusion with the premises; "undue election or return," are the expression of the facts which constitute such an election or return undue. An election or return may be undue from a variety of causes. The election may be undue, because it has not been held at the time and place fixed by law; because it has not been held by the proper officers; because the officers have not been qualified according to law; because the clerks were not qualified; because the successful candidate was incompetent to be chosen. A return may be undue, because it fraudulently falsifies the actual aggregate of the votes given; because it is founded on mathematical error; because it, intentionally or ignorantly, declares one man chosen, when the documents from which it was framed show the choice to have fallen on another.

When, therefore, the legislature say that we shall take cognisance of the complaint of an "undue election or false return" of a public officer, they mean, that we shall inquire into the facts from which such an election or return becomes undue. That such facts ought to be set forth in the petition or complaint, is manifest, as well from the terms of the law, as from the nature and fitness of things. The law requires that two of the petitioners shall swear or affirm, "that the facts *set forth* in such complaint are true." What facts? Certainly, the facts from which "the election and return" are supposed, in the complaint, to become undue. If, instead of requiring a statement of such facts, we should admit a complaint to be adequate, which simply avers an "undue election or return," what a predicament do we place ourselves in. Instead of retaining to ourselves the right of deciding *in limine*, whether the grounds of the complaint, if well-founded in fact, constitute "an undue election and return," we refer the solution of that question to the complainants, who certainly are not the best-qualified persons, either in feeling or capacity, to solve such a question. By adopting this construction of the act, we would continually find ourselves in *this* posi-

(Requisites of a petition to contest an election.)

tion. We would commence and progress in investigations, involving great expense, time and public feeling, and when we had completed them, discover that, admitting everything alleged against the dueness of the election or return to be proved, still the causes of exception are, if anything, mere irregularities which, on an investigation of the merits, we should be bound to disregard.

How, then, are we to avoid the absurdities and incongruities which would inevitably follow, should we refer the decision of the adequacy of the causes of complaint to constitute undueness, to the judgments and consciences of the complainants, instead of inquiring into them ourselves? Simply, by following the directions of the law; by requiring the complainants to set forth the facts, in such complaint, on which they found their allegation of the undueness of the election. Then we have the means of ascertaining, before we originate an expensive, burdensome and harassing inquiry, whether, on the complainants' own showing, the complaint can, if sustained by proof, avail anything against the return. Is there any hardship in this requisition? It only requires the complainants to say *why* they complain. If they have any reason for such a complaint, why not assign it? If they have none, or what is the same thing, no sufficient one, then surely, they have no right to disturb others with their mere discontents. There certainly is no danger that complainants, or any other class of suitors, will not state their own case strong enough; that rarely happens in judicial proceedings.

Again, is not the party complained against entitled to know why, and for what, his return is sought to be impeached, before he enters into a contest? Is his adversary to be permitted to mine under him, and he only to know the cause of danger by the explosion of the train? The right to notice of charge or demand lies at the foundation of the administration of all human justice; in all courts, civil or criminal, military or ecclesiastical, this right is an axiom, unquestioned and unquestionable. Is

(Requisites of a petition to contest an election.)

a naked complaint of "an undue election or return" of an elective officer, such notice to him of the cause of exception as justice requires? The question answers itself.

On the whole, we are clearly and unanimously of opinion that it is the duty of parties complaining against the election or return of an officer, under the act of the 2d of July 1839, to set forth the facts on which the complaint is founded, plainly and distinctly; and that to induce the court to proceed to the consideration of such a complaint, the facts so set forth should exhibit a case which, if sustained in proof, would render it the duty of the court, either to entirely vacate the election, or to declare that another person, and not the party returned, was duly elected to the office in question.

We are thus brought to the final question in the cause, to wit, whether, testing this complaint by these principles, it is adequate in form and substance? It commences, by stating that the election was duly held in October last, and that the judges and officers thereof returned that David C. Skerrett was duly elected prothonotary of the district court for the city and county of Philadelphia, when in truth and in fact, William Sloanaker was duly elected to the said office, as will appear by inquiry and investigation made into the merits of the said election. That the said election was an undue election, and false and fraudulent; and the returns thereof false and fraudulent returns.

It then proceeds to specify that, in many of the townships, wards and districts, to wit, the several wards of the incorporated districts of the Northern Liberties, Kensington, Spring Garden, Southwark and Moyamensing; and in the township of the Northern Liberties, as well as in the several wards of the city of Philadelphia, and in the other election districts of the city and county, the provisions and regulations of the "act relating to elections in this commonwealth," were not observed and kept. That the inspectors of said elections did not call aloud the

(Requisites of a petition to contest an election.)

respective names of all the electors upon receiving their tickets; nor did the clerks of said election repeat the names of the said electors; nor did the inspectors inscribe the letter V on the margin of the alphabetical lists, opposite the names of all such electors; nor did the inspectors note on the margins of such lists, the fact of the production of certificates of naturalization, and of such other things as are required by the 70th section of the act of assembly aforesaid; nor did the inspectors deliberately take out of the boxes in which they had been deposited, the tickets headed "County Officers," on which the prothonotary of the district court was voted, and read aloud the name of said prothonotary, and the name or names printed or written thereon, when counting the same; but in receiving and counting the said tickets, the inspectors of the said several wards, townships and election districts, proceeded contrary to the requirements of the laws of this commonwealth relating to elections.

The complaint further proceeds to state, that at said election, *many* illegal and fraudulent votes were received, taken and counted by the said inspectors and judges thereof, for David C. Skerrett for the office of prothonotary of the district court; and that it was by these illegal and fraudulent votes, and by the irregular mode of counting the tickets, and by other irregularities and illegalities, a majority has been made to appear in favor of the said David C. Skerrett, for the office of prothonotary of the district court aforesaid.

It further asserts, that at the said election, the said William Sloanaker was duly elected to the said office, as will appear by recounting the tickets or ballots voted by the duly qualified electors of said city and county; and by an inquiry and investigation into the said election, and the rejection of the illegal and fraudulent tickets, irregularly and illegally received, taken and counted for the said David C. Skerrett, as the petitioners verily believe.

In considering the sufficiency of the petition, we will

(Requisites of a petition to contest an election.)

arrange the allegations contained in it, under two categories: 1. Those which complain of irregularities: 2. Those which purport to make substantial and meritorious averments.

I. To the first of these classes belong the complaints that the inspectors did not call aloud the names of the electors, as they voted; that they did not insert the letter V on the margin of the alphabetical lists of voters, opposite the names of the electors voting; that they did not note the production of their certificates by naturalized citizens; and that they did not deliberately take out of the boxes, and read aloud the names of the persons voted for. These may be disposed of at once, by the fact that they are but directory to the officers of the election, and that, although the officers wilfully violating them may subject themselves to censure and punishment, the omissions of such officers cannot operate to nullify the election, in an inquiry directed to be determined upon the merits. In *Boileau's Case* (2 Parsons 503, ante 270), the doctrine of the court on this subject was thus expressed: "in all cases in which irregularities in conducting an election, are not of a flagrant character, we are required to look into its good faith and integrity; and if they are manifest, we are not to defeat the popular will, because of some slip in the minor details of an election, which does not prevent our ready ascertainment of what that will is; this is the spirit of the act of assembly, giving us this delicate jurisdiction; a spirit in entire harmony with our popular institutions." The effect, too, of regarding such irregularities as fatal to the election, would operate, not merely to defeat Mr. Skerrett's return; it would be equally disastrous to Mr. Sloanaker, as it would result in determining the whole election to be a nullity.

II. Nothing remains but to ascertain whether the objections to the election and return of Mr. Skerrett, which may be classified as, in their nature, meritorious, rather than formal, have that precision and directness which we

(Requisites of a petition to contest an election.)

hold to be essential, in order to induce us to entertain them; these consist—

1. In the allegation that the officers of the election have returned David C. Skerrett as elected, when, in truth and in fact, William Sloanaker was elected:

2. That the election was an undue election; and that the returns thereof, that David C. Skerrett was duly elected, are false and fraudulent returns:

3. That many illegal and fraudulent votes were received, taken and counted for the said Skerrett; and that it was by these illegal and fraudulent votes, and by the illegal mode of counting the tickets, and by other irregularities and illegalities, that a majority has been made to appear in favor of the said Skerrett: and—

4. That the said Sloanaker was duly elected, as will appear by recounting the tickets or ballots voted by the duly qualified electors, and by an inquiry into the election, and the rejection of the illegal and fraudulent tickets, irregularly and illegally received.

The sufficiency of these specifications we will consider in their order. The first, that the officers have returned Mr. Skerrett as duly elected, when, in truth and in fact, Mr. Sloanaker was duly elected, is obnoxious to the imputation of vagueness and generality; it states conclusions, not the facts from which they are drawn. Why is it that Mr. Skerrett, who has received the returns, was not duly elected? Were the votes given for him less in number than those given to any other candidate? Was his majority produced by illegal votes given in his favor, equal to any apparent majority he may have received? Was he, for any cause, ineligible to be chosen? By what process was Mr. Sloanaker elected? Did he receive an actual majority of the votes given at the election? Were legal votes offered for him, adequate to have procured his election, and rejected by the judges and inspectors? In short, how, in point of fact, is it, that the returned candidate was not elected, and he to whom the return was

(Requisites of a petition to contest an election.)

denied chosen? Instead of stating the facts from which these conclusions arise, this part of the complaint contains a simple assertion, that the returned candidate was not duly elected; and a simple assertion, that the candidate not receiving the return was duly elected. On the principles we have propounded, this allegation is insufficient.

The second allegation, which asserts the election to have been undue, and the return false, is manifestly insufficient, and for the reasons heretofore given.

The third allegation avers that *many* illegal votes were received and counted for Skerrett, and that it was by these illegal and fraudulent votes, *and* by the illegal mode of counting the tickets, *and by other irregularities and illegalities*, that a majority has been made to appear in favor of said Skerrett. Had the complainants stated, in terms, that it was by the receipt of illegal votes that Skerrett's majority was produced, this allegation might have had some claim to the necessary precision. This is not so; it is because of the *many* illegal votes given to him, and because of the illegal manner of counting the votes, and because of other "irregularities and illegalities," that Skerrett is made to receive a majority. How are we to learn from this, what influence the *many illegal votes* had in producing the result? What flowed from the illegal manner of counting the votes? And what is chargeable to other "irregularities and illegalities?" Many illegal votes may mean tens or hundreds. Mere illegality in the manner of counting votes, cannot, as we have said, invalidate an otherwise fair election, however it may subject, and justly too, the offending officers to punishment. And "other irregularities and illegalities" is too vague to carry any definite meaning. This specification is compounded of various elements—some formal, some substantial; some that would have been material, if more explicitly set forth, and others wholly immaterial in an inquiry into the merits of an election. It is, therefore, most clearly



(Requisites of a petition to contest an election.)

wanting in that precision and directness which ought to enter into such a complaint.

The last specification, if it could be so called, states simply what would be the result of the inquiry prayed for. It says that Sloanaker was duly elected, as will appear by recounting the ballots voted by the qualified electors; by an inquiry and investigation into the election; and the rejection of the illegal and fraudulent tickets, *irregularly* and illegally received and counted for the said Skerrett. But if we should treat it as an attempt at a specification of the facts on which the investigation is asked, it must share the common fate of its associates. It is vague, unprecise and argumentative; associating *irregularities* and *illegalities*; affording no sufficient notice to the returned officer of the grounds on which his election is assailed; and wanting in that clearness, plainness and succinctness which ought to characterize such a proceeding.

This will be more distinctly perceived, by considering it, disconnected from its congeners. The result asserted, viz: the election of Mr. Sloanaker, will appear, it is said, from a recount of the ballots voted by the *qualified* electors. It does not say, except inferentially, that there is any error in the count of the actual tickets voted, either from mistake or fraud of the officers. It does not point out the extent of the mistake, whether it amounts to one or one thousand votes; it does not say, where it occurred, whether in some particular district, or in the summing up by the return judges of the aggregate vote given in all the districts; and finally, it does not say, that there is any error in the actual summing up of the tickets deposited in the ballot-boxes, but the error, it supposes, may be discovered by a recount of the ballots voted by the *qualified electors*. The ascertainment of this would require the canvassing of every vote given, in order to arrive at this result, by the separation of the legal from the illegal voters. By an ingenious generalization, therefore, such

(Requisites of a petition to contest an election.)

an allegation would open the whole election; permit every kind of objection to be started against the votes given and received; and this, without any precise or specific averment being previously made against the propriety of their reception. To hold such a generalization adequate, would nullify our own doctrines, and render precision in specification unnecessary.

But this conjectural insinuation of error in the count, is not assigned as the sole ground for the conclusion drawn, that Mr. Sloanaker is elected. It is associated with allegations "of illegal and fraudulent votes, irregularly and illegally received;" and the conjoint operation of the recount of the ballots, and the rejection of the illegal and fraudulent votes, irregularly and illegally received, it is supposed, will show Mr. Sloanaker to have been elected. What number of illegal and fraudulent votes were received; where they were received; how they were illegal; whether from non-age of the voter, non-residence, want of citizenship, or want of assessment or payment of taxes; is not intimated; and with the complaint of votes illegally given, is united a complaint of votes "irregularly" given. Now, we have seen, that mere irregularity in the reception of votes is not a meritorious ground of exception to an election. This specification, supposing it to have been intended as such, therefore, is at best, a mere summary of many of the objections given previously in detail, in the complaint, but in such a vague and general manner, as to be regarded by us as wholly insufficient. If inadequate in detail, they cannot be less so when united.

A specification which is nothing more than an hypothesis; a specification as to what would, in the opinion of the complainants, follow an investigation; is not the plain and clear statement of facts, on which an election is proposed to be contested, required by the true intent and meaning of the law. If the judges of any particular district, through fraud or mistake, have miscounted the votes given to any candidate; if the judges of any particular district have

(Requisites of a petition to contest an election.)

received illegal votes, or rejected legal votes; if the operation of all or any such errors, omissions or commissions has changed the true result of the election, it is easy to say so, designating where and how they have been perpetrated. But it would be intolerable, if this or any court should entertain a complaint impugning, in a sweeping denunciation, all the acts and doings of a whole county election, without containing any intimation as to when, where, how and by whom, such malversations have been perpetrated.

At the election we are called to disturb, on this vague complaint, 40,000 freemen deposited their suffrages; it was conducted by about 300 sworn officers, chosen by the people for this purpose, comprising gentlemen of all party complexions; surely, before we stir in such a business, a complaint, precise in its terms, definite in its charges, and adequate in its general character, if proved, to vacate the election, should be laid before us. Although it is certainly true, that it is of the first importance that the citizens should be satisfied of the integrity of all public elections, and although all proper facilities should be afforded to ferret out frauds, where they are supposed to exist, yet, an election solemnly held, is not to be trifled with by any, be they judges or citizens. What has been done by the sworn agents of the law, is always to be presumed rightly done; and those who seek to impeach the acts of these functionaries, must not expect to be entertained, if, instead of bringing positive, tangible and direct charges, they content themselves with general, argumentative and theoretic imputations.

In the opinion of the court, and for the reasons assigned, this complaint must be quashed.

Petition quashed.

---

Whilst the principle established in Skerrett's case has ever since been recognised as the law of Pennsylvania, it is in vain to deny that it has occasionally been departed from in practice. So long as the judicial

(Requisites of a petition to contest an election.)

tenure is for a limited term of years, and the judges to whom this delicate jurisdiction is confided are dependent upon a partisan nomination and a popular election for their continuance in office, it would require more than human virtue and independence, at all times, to hold the scales of justice with an even hand, in cases appealing so strongly to the political prejudices of themselves and those upon whose votes their tenure of office is dependent.

In *Carpenter's Case*, 2 Parsons 537, it was held, that unless a petition contesting an election set forth such facts as would change the result, the court will not entertain it, nor order an investigation; the court assimilate such petitions to other legal proceedings, and require that precision in averment which is demanded in other cases, where the court decides both the law and the fact; if the ground be fraud, the petition must state with precision in what the fraud consists, and must show how it changed the result of the election, otherwise, it will be quashed, on motion; and this, on the ground that whatever is done by persons *de facto* exercising a legal authority, is presumed to be done rightly. It is not sufficient to state that A. received a majority of the votes, while the return was given to B., and therefore, the complainants allege that there was an undue election; this is but a conclusion drawn by the petitioners from facts not stated to the court. The same point was ruled in *Lelar's Case*, cited in 2 Parsons 548.

In *Kneass's Case*, 2 Parsons 553, it was ruled, that every petition alleging an undue election and false return, must be complete in itself, and state such ground as would, if sustained by proof, be cause for rendering it void, or declaring another elected; where some of the grounds alleged are mere irregularities which, if sustained by proof, would not be sufficient cause for setting aside the election, such specifications will be stricken out, on motion, and the respondent will not be put to the trouble of taking proof. And see *Batturs v. Megary*, 1 Brewst. 162; *Thompson v. Ewing*, Ibid. 68. In *Mann v. Cassidy*, 1 Brewst. 11, it was held, that the petition must state the facts distinctly; charge an undue election and false return; show the figures returned for each candidate; the votes which were received by each; and then specify the divisions in which the votes were illegally received, the manner in which the fraud was effected, and the number of votes fraudulently received; but the petitioners need not set out their full knowledge, the names of the illegal voters, nor the reason why the votes were illegal.

(Requisites of a petition to contest an election.)

An allegation of fraud committed by the election officers is immaterial, unless it be also stated that the result has been affected; nor is it sufficient to aver that votes were fraudulently received, unless it be stated for whom they were polled, and the number. *Ibid.*

In *Weaver v. Given*, 1 Brewst. 140, the same court decided, that all that can be required in a petition is, that the allegations be stated in an intelligible manner, and with due precision; that a statement that a certain number of votes was received, in divisions named, from persons not qualified, and that they were counted for one of the candidates, was sufficiently certain; and that the reasons on which the charge of illegality is based, and the names of the voters, need not be given. *Gibbons v. Sheppard*, 2 Brewst. 2; 65 Penn. St. R. 36. That the names of the illegal voters need not be stated was re-affirmed, in *Batturs v. Megary*, 1 Brewst. 162; and it was there also decided, that a specification may charge the receipt of illegal votes in two or more divisions. And see *Gibbons v. Sheppard*, 2 Brewst. 2; 65 Penn. St. R. 37.

The last decided case upon this point is that of *Gibbons v. Sheppard*, in the supreme court of Pennsylvania, where it is said by Mr. Justice Agnew, that certainty to a common intent is all that is required; that the early decisions by Judge King were too stringent; that the rule must not be held so strictly as to afford protection to fraud, by which the will of the people is set at naught, nor so loosely as to permit the acts of sworn officers chosen by the people to be inquired into without adequate and well-defined cause. 65 Penn. St. R. 36-7; *Mann v. Cassidy*, 1 Brewst. 26-7.

In the senate of Pennsylvania, the same rules, as to the precision requisite in a petition contesting the seat of a member, have been adopted in several cases. In Chapman's case, in 1844, a committee consisting of Messrs. Sterigerè, Darsie and Penniman, reported that the petition was insufficient because of the omission of the petitioners to set out the fact of illegal votes having been given, where given, and by whom; and their report was adopted by the senate. 1 Senate Journal 1844, p. 88. In the case of *Diamond v. Watt*, the committee struck out no less than fifty-four specifications, for insufficiency, holding them to be too vague and indefinite. Legislative Doc. 1870, p. 1061-2. And finally, in *Dechert's case*, a special committee, of which Mr. Buckalew was chairman, decided that the senate is only required to send to a committee for trial, a question of real disqualification of one of its members,

(Requisites of a petition to contest an election.)

arising upon an undue election or false return; and is neither required nor authorized to send a question for trial, which can, by no possibility, result in establishing a disqualification for membership in the sitting member. In its judicial capacity, therefore, the senate, judging of the sufficiency of a case presented by a petition, will order it to be tried in the constitutional manner, only in a case where, upon its being sustained, the result will be disqualification of membership. 16 January 1871. And see to the same effect, Cushing's *Lex Parl. Am.* § 150.

The law has been held otherwise in Ohio; *Howard v. Shields*, 16 Ohio St. R. 184; and in Kansas, it is not necessary that a notice of contest should aver that the causes alleged would have changed the result; *Steel v. Martin*, 5 West. Jur. 33; but in Minnesota, under a law requiring a person who contests an election to give notice "of the points on which the same will be contested," the notice must specify the grounds on which the plaintiff relies; *Taylor v. Taylor*, 10 Minn. 107. And in Louisiana, where the statute requires the contestant to set forth specially all the grounds of contest, if it be on account of the alleged violation of a particular law, he should specify what provisions of such law have been violated. *Augustin v. Eggleston*, 12 La. An. 366.

In Pennsylvania, under the act of 1839, which requires that the facts set forth in the petition should be verified by the affidavit of two qualified voters, it must be sworn to by two of the petitioners; an affidavit by two other voters will not satisfy the requirements of the law. *Clark's Case*, 2 Parsons 521. But under a statute which requires an affidavit that the facts set forth in the petition *are true*, it is sufficient that the petitioners aver that the same are true "to the best of their knowledge and belief." *Gibbons v. Sheppard*, 65 Penn. St. R. 20. The petitioners must subscribe the petition; it is not enough, to obtain their signatures to a blank sheet of paper, and subsequently to attach the same to the petition, even with their assent; under such circumstances, the petition will be quashed. *Northumberland County Election*, 1 Phila. 446. The petitioners, however, will not be allowed, subsequently, to withdraw their names from the petition; after the jurisdiction has attached, it becomes a public contest. *Clinton County Election*, 3 Penn. L. J. 160, 166; *Kneass's Case*, 2 Parsons 570-1.

## KNEASS'S CASE.

In the Court of Quarter Sessions of Philadelphia.

DECEMBER SESSIONS 1850.

(REPORTED 2 PARSONS 553.)

[*Amendment of petition.*]

If a petition, contesting an election, be defective in matter of form or of substance, it may be amended, provided the application to amend be made at the earliest possible opportunity.

The amendment need not be signed by all the original petitioners ; it is enough, that it be presented by the number required by law to unite in an original petition, and duly verified.

This was a petition complaining of an undue election and false return of Horn R. Kneass, for the office of district-attorney for the city and county of Philadelphia. On return of the citation, the counsel for the respondent moved to quash the petition, on the ground that there were no specific charges of fraud, and no allegations of an undue election or false return sufficient to set aside the election, and that the petitioners did not state how or in what respect the result would be changed. Before argument of the motion to quash, the counsel for the petitioners moved for leave to amend the specifications, by inserting the number of votes returned for Mr. Kneass, and the number for Mr. Reed, the opposing candidate; also by averring the majority alleged to be had for Mr. Kneass, and that it was false and fraudulent; it was also proposed to amend by attaching a copy of the entire return as filed in the office of the prothonotary.

*Meredith, Williams and Campbell*, for the contestants.

*Hirst and Dallas*, for the respondent.

(Amendment of petition.)

PARSONS, J., after discussing the sufficiency of the specifications in the petition, delivered the opinion of the court, upon the motion to amend, as follows:

There is another important question for our decision in this case. After the motion to quash had been made, and before the argument began, the counsel for the contestants moved to amend their petition so as to meet the objections made against its validity, set forth in the motion to quash; which amendment, if allowed, would make all the specifications, not ordered to be stricken out, good; and obviate the objections on which the motion to quash is made. The question is at once presented, can an amendment be allowed in a petition to set aside an election?

It is contended by the counsel for the contestants, that this petition is susceptible of an amendment, under the 63d section of the act of the 21st of March 1806; but in our opinion, that act cannot, with propriety, be applied to a case like the present. The *suits* in which the court is required, by that law, to allow amendments, are specially defined by the act; they are actions brought for "moneys owing or due, or for damages by trespass or otherwise." It is, therefore, difficult to bring the present application within the provisions of that law, so as to make it a binding statutory direction on the court, requiring them to allow the amendment, as a matter of right, as is the case in the suits described in the act. If then, the amendment can be allowed at all, it must be under the general common law power, which can be exercised in all cases, where there is no express prohibition in the statute giving jurisdiction to the court, in the case presented for adjudication. In this view alone the question must be considered.

In the first place, it may be remarked, there is nothing in the act of 1839, which prohibits the allowance of amendments; on the contrary, the powers conferred upon the court are large and extensive, and the discretion limited only by those great principles which govern courts



(Amendment of petition.)

in the exercise of their common law powers. What then, are the rules, under the common law, which govern the court, in granting or refusing amendments?

It is said by Chief Justice Tilghman, in the case of *Benner v. Frey*, 1 Binn. 369, that amendments are reducible to no certain rule, but that each case must be left to the sound discretion of the court; and that the best principle seemed to be, that an amendment should or should not be permitted to be made, as it would best tend to the furtherance of justice. It is said, in *Bailey v. Musgrave*, 2 S. & R. 219, that where the object of an amendment is to do justice, courts are vested with extensive powers, not only by statute, but by common law. In the case of *Fisher v. Rutherford*, Bald. 193, it was ruled, that where there was a want of averment of citizenship of parties, it could be supplied by an amendment. In the case of *Caster v. Wood*, Ibid. 289, an answer made under oath was allowed to be amended, by the insertion of new matter, material to the case; the court there said, such an application is not a matter of course, but must depend on the discretion of the court. In the case of *Megargell v. Hazleton Coal Co.*, 8 W. & S. 342, it was ruled, that an action *qui tam* could be amended, by inserting the name of the common informer, after an appeal to the common pleas, and when the cause came on for trial. In the case of *Sweeny v. Delany*, 1 Penn. St. R. 320, an amendment was allowed, by the transfer of the record in one case to that of another, though it resulted in the loss of an appeal from an award of arbitrators; and the supreme court said, the common law power of the court below was adequate to the amendment, nor was such an exercise of discretion the subject of a writ of error. To the same point is *Davis v. Church*, 1 W. & S. 240, and *Commonwealth v. Hultz*, 6 Penn. St. R. 469.

From these and many other authorities which might be cited, it is well settled in Pennsylvania, that amendments, not regulated by the act of 1806, must be granted

(Amendment of petition.)

or refused under the exercise of a sound discretion of the court, *for the furtherance of public justice*, and is not the subject of revision by a higher court; in short, it is an appeal to the *conscience* of a judge.\*

It is admitted by the counsel for the respondent, that, in England, in cases of *quo warranto* (where the validity of elections is generally contested under such a form of proceeding), amendments are allowed to the information; this, however, is done by express statute, and without such power by statute, it could not be exercised. But in this state, it has been ruled, that in this class of cases, while it is doubtful whether the act of 1806 will apply, yet, said the court, we have the power to authorize amendments in pleadings, which we are always disposed to exercise in furtherance of substantial justice. *Commonwealth v. Gill*, 3 Whart. 236.

Against the exercise of this power, in petitions of this kind, two classes of cases have been relied on by the counsel for the respondent. The first is the case of *Rex v. Barzey*, 4 M. & S. 253, decided in 1815, which was an application to amend an affidavit in a case of *quo warranto*, and it was refused; for, said the court, it would be a dangerous precedent, to permit the parties to amend, they must make a new application.

The others are the cases of *Rossett v. Hartley*, 7 Ad. & E. 552, and *Bodfield v. Padmore*, 5 Ad. & E. 785, where a party had obtained a rule before one judge, in a bail court, and it had been discharged, and it was held, that a new rule should not be granted. Those of *Rex v. Francis*,

\* A dangerous power, in an election case, to be vested in an elective judiciary, holding for a limited term, and dependent for their continuance in office on a partisan nomination. A power inconsistent with the first principles of free government. "The discretion of a judge," said Lord Camden, in *Hindson v. Kersey*, 1 Day 81 n., "is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion; in the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable."

(Amendment of petition.)

2 Ad. & E. 49, and *Rex v. Smithson*, 4 B. & Ad. 861, were cases where an application had been made for a criminal information, which had been heard and determined, when a new application was made on additional affidavits, and the second application was refused, "because," said the court, "the parties should come prepared, in cases of this sort, at the first hearing." The case of *Regina v. Benton*, 9 Dowl. 1021, was one where there had been a verdict for the defendant, but leave was given, on a point reserved, to enter a verdict for the crown, and a rule was granted for that purpose, which was argued and made absolute; the defendant afterwards obtained a rule for the purpose of confining the verdict for the crown to the first two counts in the indictment, and this was discharged, because the parties had before had a full hearing in the case. The case of *Regina v. Harland*, 8 Dowl. 323, has also been relied upon, which was one where there had been an application for an attachment against the clerk of assize, for not returning a writ of *certiorari*, but the rule was discharged; a second rule was then applied for, which the court refused, upon the ground that the case had been fully heard, and they would not suffer the application to be renewed.

In my opinion, these authorities do not apply to a case like the present. All of them, except that of *Rex v. Barzey*, were cases which were ruled upon an arbitrary practice established in the English courts, for the government of their own particular manner for the transaction of business, and were not decided upon any of the great and established principles which govern the courts, either in England or this country, in the exercise of a sound discretion in relation to the justice or the merits of a given case. Further, in none of them, except that above referred to, was there an application to amend the record, but all are motions for a new or further hearing, after the point had been heard and decided. Had the court, in the present case, heard the parties on their petition and objections, and a full argument of the whole matter, after

(Amendment of petition.)

which the cause had been dismissed, and this was a new petition, and a second hearing was applied for, on a more perfect petition, then I can perceive how these authorities might be supposed to have some bearing on a question presented under such circumstances. But such is not the case we are now considering; here is an application to amend, as soon as the defect is pointed out, and before a step is taken in the hearing of the cause. I, therefore, cannot conceive how these cases can, in any respect, be said to rule the present, because they establish no principle and decide no point of amendment.

The case of *Rex v. Barzey*, was an application to amend an affidavit in a case of *quo warranto*; it was not to amend a suggestion, which would be more like the present case; nor was it to amend a plea filed by the defendant; therefore, it would have really no weight on a question of pleading, to which the present proposition must be assimilated. But whatever may be the value of this authority, it is sufficient for our purpose, that the supreme court of this state have ruled directly the reverse; for, in the case of *Commonwealth v. Gill*, an amendment was allowed in a case of *quo warranto*; an entire plea was permitted to be withdrawn and another substituted. Sitting as we do, in a Pennsylvania tribunal, we should be bound by the decisions of the tribunal of last resort here, rather than those of a foreign court. It is to our law I feel bound to submit, not only as a duty, but upon principle, no matter what may be its operation on suitors. In this connection, I have examined all the authorities on which the counsel for respondent have relied.

Two questions, then, arise for deliberate consideration: 1. Will the court ever allow a petition, in the case of a contested election, to be amended? 2. Is the amendment now asked one that can be permitted by any established rules of law?

I. In my opinion, there are cases in which the court ought to allow a petition of this description to be amended; as

(Amendment of petition.)

an illustration, suppose one be presented, charging the grossest fraud in a clear and specific form, with a direct averment that these fraudulent acts changed the result, and the manner in which the result would have been changed; but it was entitled in the common pleas, instead of the court of quarter sessions, where the contested election of county officers must be heard, and the contestants asked leave to amend, by entitling it in the proper court, can any one doubt, that such an amendment ought to be allowed, and that it would be, by a court wishing to administer justice to its suitors? That it would be, there have been many authorities cited to show, and others will be, in the consideration of the next proposition; and moreover, we have settled principles in previous election cases, which, if now maintained and adhered to as sound law, will absolutely prevent our deciding that no amendment can be allowed in any case. To say that we will refuse an amendment in all cases, would be in opposition to the previous indications of the opinions of a majority of this court in the previous cases, and utterly inconsistent with the principles laid down by us, in Carpenter's case, a few weeks ago.

It was declared by Judge King, in the case of the County Treasurer, decided in October 1845, that "liberty would be granted to amend the petition, if application were made." Although the point did not come up for a direct adjudication, yet, Judge Jones and myself being upon the bench at the time, with the president judge, when the announcement was made in that case, my own opinion responded to what was then indicated, as the expressed sentiment of the court, and I am confident that an amendment would have been granted, if asked for; but it was intimated by counsel that they preferred a review of our opinion, on the petition as it then stood, by the supreme court. It was with a full recollection of the views then indicated by my brethren on the bench, that I ventured to make the assertion, in the Penn District Election case,

(Amendment of petition.)

last spring, cited in the argument (while I differed from my brethren on the main point decided), and when this opinion was read in their hearing, there was no dissent from the proposition, that if a petition were defective, it might be amended. It was said by us, in the case of Carpenter (all the judges agreeing thereto), that it was to the merits of the case alone the court would look; that to mere matters of form, or irregularities which could have no bearing on the result, we would not listen; and this principle must be applied as well to a question of pleading, as to a review of the conduct of election officers. How can the court determine upon the merits of a case, if we sternly refuse to let the parties present the facts fully before us, or drive them out of court on a mere technicality or form of pleading, as we shall do, if we lay down the broad doctrine that a petition of this description can never be amended in any particular?

It is the opinion of a majority of the court, that an amendment can be allowed to a petition for the contest of an election; and this must depend upon the exercise of a sound discretion by the court, in each particular case, with a view to the furtherance of public justice. It is difficult to say in what cases an amendment would be allowable; it is much more easy to lay down a rule when it would not be. An amendment should never be permitted, when the charges in the petition are general in their character, or when the specifications have relation to mere irregularities in the conduct of the officers as to the return, or informalities in the same, when there is no charge of fraud, nor allegation that it could have had any influence upon the result; nor in any instance, if the charges, sustained by proof, would afford no substantial ground for setting aside the election.

II. The second point for consideration is, whether the amendment now proposed is one that the court ought to allow? In the opinion of a majority of the court, the amendment now proposed is one that should be permitted.

(Amendment of petition.)

And first, because it is a settled rule, both in this country and in England, that in all legal proceedings, amendments are allowed, where there is anything to amend by. *Green v. Rennet*, 1 T. R. 782; *Guhr v. Chambers*, 8 S. & R. 157.

It has been shown that in eleven out of the twenty-six specifications, there are charges of direct *fraud*, mentioning the wards, and the manner in which the alleged frauds were perpetrated. Take, for instance, the fourth specification, where it is charged "that in the Second ward, Moyamensing, 153 votes and upwards were deposited for William B. Reed, as district-attorney; whereas, the officers of the election have fraudulently returned but 94 votes, the remainder being either fraudulently withdrawn from the ballot-box, or counted as having been given for Horn R. Kneass." Now, the amendment proposed is, to add, that by this the result was changed; that by giving the number of votes which each candidate received, it would show to the court how and in what manner the result would be changed. Here, then, we have the very case coming within the rule above laid down, something to amend by, to wit, the fraud charged, the place where it was committed, and the extent thereof. I do not see how we can refuse it, if we regard this as a proceeding in a court of law, and are consistent with former decisions.

We have said, but a few weeks ago, that these contested elections must, as far as possible, be assimilated to other legal proceedings. (*Carpenter's Case*, 2 Pars. 537.) What, then, is the rule in all other legal proceedings? We have given some cases. I will mention a few more, which seem to apply with peculiar force here. An appeal of murder may be amended, *Smith v. Bowen*, 11 Mod. 230; a recognisance of bail may be amended and made agreeable to the writ, *Faggot v. Van Thiennen*, Cas. Pr. C. P. 75; in ejectment, the term of the demise may be enlarged, *Oates v. Shepherd*, 2 Str. 1272; *Gale v. Babcock*, 4 W. C. C. 199; a declaration in a penal action may be amended, *Anon.*, 1 Wils. 256. So, the court allowed a plaintiff to amend

(Amendment of petition.)

his declaration, in a penal action, after the time limited for bringing another action, there having been no unnecessary delay in his proceedings, *Cross v. Kaye*, 6 T. R. 543; a declaration, in an action for usury, was amended, after the record was made up, carried down to trial, and withdrawn by the plaintiff, *Mace v. Lovett*, 5 Burr. 2833. It is said, in *Rex v. Holland*, 4 T. R. 457, and *Rex v. Wilkes*, 4 Burr. 2527, that amendments in criminal informations are now so much a matter of course, that they are made on application to a judge at chambers. *Cole*, Crim. Informations 70; 1 Chitty Cr. L. 868. Cases of this sort are more like the one under consideration than, perhaps, any other kind. With these conclusive authorities, and many more which might be cited to the same point, if they are to have the least influence on the judicial mind, I do not see how the present amendment can be refused, if we adhere to our previous ruling, that we will liken these petitions to other legal proceedings.

But in my opinion, there is another ground on which the present application should be allowed, still stronger, if possible. There are a number of specifications in which there is a direct charge of fraud, that, if sustained by proof, are of the most flagrant kind; and had the petitioners averred that these alleged fraudulent acts would have changed the result, and how it would be changed, it must be admitted, this court would have had no hesitation in at once directing the proof to be taken. So soon as this omission is pointed out, the contestants propose to insert in their petition all which the respondent requires, to make it proper that an inquiry should be had; therefore, in our opinion, we ought now to permit the petition to be amended. The cause of public justice demands it; it is due to the people of the county, and it is due to the gentleman who holds the certificate; for I am sure neither he, nor any other high-minded, honorable man, would wish to hold an office so important, except by the suffrages of a majority of the people, truly and fairly expressed. And



(Amendment of petition.)

we should do an injury to Mr. Kneass, as well as to the cause of public justice, if, in the exercise of a sound discretion, we refused to open the doors of a judicial tribunal for a full inquiry into charges so grave as those alleged in this petition, if it can be done consistently with the rules of law and the practice in legal proceedings. That it can be, I think, has been abundantly shown by authority.

In this exercise of a sound discretion relative to the allowance of amendments, the court should always have in view, the great object in all legal proceedings, the elucidation of truth; also a desire to detect and expose fraud; therefore, if there were no other ground, the specific allegation of *fraud* should be sufficient. When the supreme court, in the case of *Mitchell v. Kintzer*, 5 Penn. St. R. 216 (also reported in 8 *Ibid.* 64), have held that a decree of an orphans' court, and a sale by an administrator in pursuance thereof, a deed executed, a judgment subsequently entered against the purchaser, and a sale by the sheriff on the same, and his deed solemnly executed, may all be impeached and set aside on the ground of fraud; surely, this court would be wanting in respect for adjudicated cases, if we should refuse to suffer an investigation of an election fraud, involving the right of suffrage of 50,000 voters in this city and county. And perhaps there is no case in which the eloquent language of Judge Coulter, in the case of *Mitchell v. Kintzer*, could be cited with more propriety than in the present: "in the eye of the law," said the learned judge, "fraud spoils everything it touches; the broad seal of the commonwealth is crumbled into dust, as against the interest designed to be defrauded; every transaction of life between individuals, in which it mingles, is corrupted by its contagion; why then should it find shelter in the decrees of courts? *there* is the last place on earth where it ought to find refuge; but it is not protected by record, judgment or decree; wherever and whenever it is detected, its disguises fall around it; and the lurking spirit of mischief, as if touched by the

(Amendment of petition.)

spear of Ithuriel, stands exposed to the rebuke and condemnation of the law."

In my opinion, we should be wanting in a faithful administration of that high trust which the legislature has confided to us by the act of 1839, if we should refuse the amendment now asked; we should give countenance to an alleged fraud, and perhaps conceal it from public view; a thing which no principle of law sanctions, and which, as a judge, I never have suffered, nor ever will suffer, when presented to my view.

It has been contended, that the amendment, in the form now offered, cannot be allowed, inasmuch as there are more than thirty citizens who signed the original petition, and only twenty-one of them have signed a petition for the present amendment, although verified by the same persons who made the affidavit to the original petition. This objection, on no sound principle, can be sustained. Suppose an election has been carried by the most abominable fraud; the act requires there should be twenty citizens of the county to sign a petition for the contest; ten of those who were concerned in the fraud might unite with ten innocent individuals in the contest, and then appear and ask to withdraw, or refuse to unite in an amendment clearly admissible, and thereby conceal the very fraud they had concocted and perpetrated. I concur with Judge Woodward, in his able opinion in the Clinton County Election Case, 3 Penn. Law J. 160, 166, that the jurisdiction of the court attached from the moment the petition was filed, and a few individuals, by withdrawing, should not shut out all inquiry. Here, the number have signed the petition to amend, that is required by the act, which is a sufficient answer to the objection; and even if they had not, we would never suffer the course of public justice to be obstructed, because some choose to withdraw. Therefore, in our opinion, the amendment proposed should be filed, and be considered as forming a part of the ori-

(Amendment of petition.)

ginal petition for the purpose of a future investigation of the case.

Amendment allowed.

CAMPBELL, J., dissented.

---

The right of the courts, under their common law power to permit an amendment of a petition contesting an election, was affirmed by the supreme court, in *Gibbons v. Sheppard*, 65 Penn. St. R. 20, 35. "In point of reason," said Judge Agnew, "why should the court not have power to amend, in a contested election case? It is a judicial remedy, and concerns important rights. On what ground should the cause of the people be held so strictly, that a mere specification of facts within the same general complaint, relating to the same contest, and the same returns, should not be amended in order to reach the very *merits* the court is ordered to try." It was held in the same case, that it was in the power of the court below to allow an amendment, *nunc pro tunc*, after the case was closed; and that being a discretionary power, the propriety of its exercise could not be reviewed by an appellate court.

The amendment, however, must be confined to defining more clearly the charges made in the several specifications in the original petition. If it be inconsistent with the petition, or attempt to introduce new matter, it will not be allowed. *Mann v. Cassidy*, 1 Brewst. 32; *Thompson v. Ewing*, *Ibid.* 68, 97, 101. But the amendment need not be verified by the oaths of the identical persons who swore to the truth of the original petition. *Mann v. Cassidy*, 1 Brewst. 11.

The court will not permit an amendment of the answer, during the progress of the hearing. This was decided in *Mann v. Cassidy* (Report 386), where Judge Thompson says: "This case differs from most others, and we must shape our decisions according to its peculiarities; the contestant is bound, within a certain time, to file his petition, setting forth his objections; and in our opinion, after his case is commenced, he cannot introduce new matter. The answer put in by the respondent, sets up fresh subjects of inquiry; in addition to a mere formal traverse, he puts in distinct charges, bearing upon nothing in the petition, but being an attack which would have been made by Mr. Cassidy, if Mr. Mann had been returned; if that had been the case, fairness would have required him, in like manner, to spread his whole case upon the record.

## (Amendment of petition.)

So far as the answer is responsive to the petition, the respondent can go into the fullest inquiry; but so far as it sets up new matter, we think he must aver it all, before his case commences; the same fairness which required the contestant to do this, applies with equal justice to the respondent."

But in Dechert's case, it was ruled, by the senate of Pennsylvania, that a legislative election committee is not authorized, by law, to permit a petition to be amended in matter of substance. "Amendments merely formal, including corrections of error, may, of course, be made at all times by permission, because they will not change the substance of the petition, or the character of the issue to be tried. It is possible, that amendments affecting substance have sometimes been allowed by committees, in view of precedents drawn from courts of justice; but, if so, their allowance must have been without due consideration. Courts of record claim a common law power of amending election petitions before them; and this power was affirmed by our own supreme court in a case recently determined; but clearly, election committees of the legislature have no common law jurisdiction or powers; they are creatures of the statute of 1839, and have only such powers as the statute gives them, among which no power of amendment is contained. Besides, the oath to be taken by members of election committees, as prescribed by the 137th section of the act of 1839, is, in itself, almost decisive against their possession of any general amendment power; that oath is 'to try the matter of the petition, and give a true judgment thereon, according to the evidence, unless the committee shall be dissolved;' obviously, they are to try the matter of the petition as it comes to them, and not as it may stand after they shall have changed it, in any essential particular, by amendment." 16 January 1871.

MANN *v.* CASSIDY.

In the Court of Quarter Sessions of Philadelphia.

SEPTEMBER SESSIONS 1856.

(REPORTED 1 BREWSTER 11.)

[*Striking out specifications.*]

The court will strike out from the petition contesting an election, all specifications which do not set forth matter sufficient to throw out the returns, or to hold the election void.

The petition must state the facts distinctly; charge an undue election and false return; show the figures returned for each candidate, the votes received by each, and the divisions in which votes were illegally received; also, the manner in which the fraud was effected, and the number of votes fraudulently received; but the petitioners need not set out their full knowledge, the names of the illegal voters, nor the reason why the votes were illegal.

This was a petition contesting the election of Lewis C. Cassidy to the office of district-attorney for the city and county of Philadelphia, at the general election of 1856.

The petition averred that Lewis C. Cassidy was unduly returned as having received 34,475 votes, and William B. Mann as having received 33,924 votes for said office; whereas, the petitioners alleged that Lewis C. Cassidy received not more than 32,915 votes, and that William B. Mann received at least 34,399 votes; whereby the latter had a majority of at least 1484 votes, and was duly elected to the office. The petition then proceeded to specify the grounds of contest, the form of which, from the 3d to the 46th inclusive, was as follows: 3. "That in the 5th division of the 1st ward of the city of Philadelphia, the election officers of said division received the votes of persons to the number of ten, and upwards, for the office of district-attorney, which were taken and counted in the general return for Lewis C. Cassidy, for district-attorney, none of whom were qualified electors in said division." Then fol-

(Striking out specifications.)

lowed a series of specifications averring that, in certain election divisions, at the election for inspectors, the voters fraudulently divided their vote, so as to elect two inspectors representing their own particular views; that in said divisions, certain votes were received for Lewis C. Cassidy for district-attorney, and that the inspectors in receiving such votes utterly neglected to comply with the directory provisions of the election law. The respondent's counsel moved to strike out the specifications, except the 1st, 2d and 43d, and to quash the petition for the insufficiency of the remaining specifications.

*B. H. Brewster* and *McCall*, for the respondent.

*F. C. Brewster*, *D. P. Brown* and *John M. Read*, for contestants.

THOMPSON, P. J., delivered the opinion of the court. It is impossible to specify with precision all that a petition contesting an election must contain. If presented according to the provisions of the law, all that the court can require is, that it shall state, in an intelligible manner, and with due precision, such facts as, if sustained by proof, would show that there has been an undue election and false return. It is obvious, that if the court were to require the same precision and certainty in an election petition, as in the pleadings between parties to a suit at law (the object of which is, to produce a single issue), the difficulty of stating precisely the manner in which a fraud had been perpetrated, or an undue return made, would, to a great degree, nullify the law itself, which designs that such charges shall be investigated. The rule must not be held so strictly as to afford protection to fraud, by which the will of the people is set at naught; nor so loosely as to permit the acts of sworn officers, chosen by the people, to be inquired into, without an adequate and well-defined cause. To ascertain and to apply the proper rule, has

(Striking out specifications.)

always been the effort of this court, and the following principles applicable to the case in hand may be deduced from decided cases:

1. That the powers conferred upon the court, in relation to contested elections, are to be exercised judicially; and in such cases, proceedings are to be regulated, as far as practicable, by the established rules of judicial procedure.

2. That the petition must set forth plainly and distinctly, facts which, if sustained by proof, would render it the duty of the court, to entirely vacate the election, or to declare that another person, and not the person returned, was elected to the office in question. *Skerrett's Case*, 2 Pars. 509 (ante 320); *Carpenter's Case*, *Ibid.* 537.

3. That the court will strike from the petition all irrelevant or general allegations, which cannot affect the merits of the case or the general result. *Kneass's Case*, 2 Pars. 553.

4. That a petition to set aside an election may be amended, and especially, where leave to amend is applied for, before any progress is made in the hearing of the case.

We do not deem it necessary to examine or review the correctness of either of these propositions; they have been settled, after much and repeated consideration; they have been frequently applied, and have stood the test of experience; we have heard nothing, upon this argument, to induce us to reconsider either of them, and they must now be regarded as the settled law, so far as this court is concerned. The application of these principles to the rules under consideration, will enable us to decide them without difficulty. These rules are, on the part of the party holding the return, to show cause: 1. Why the specifications in the petition of the contestants, except the 1st, 2d and 43d, should not be stricken out: 2. Why the petition should not be quashed, for the insufficiency of the 1st, 2d and 43d specifications. The reasons in support of the motion to strike out, are, that the said specifications are not sufficient in law; that they are not specific; that

(Striking out specifications.)

they do not set out the names of the voters from whom illegal votes are said to have been received, nor how such votes are illegal. The specifications referred to are precisely alike, except as to the number of votes, and the election division and ward in which they are charged to have been illegally received; it is, therefore, unnecessary to refer to them separately.

The petition alleges that the election return of Lewis C. Cassidy, as district-attorney, is false, fraudulent and untrue, in this, that Lewis C. Cassidy was unduly returned as having received for said office 34,475 votes, and William B. Mann 33,924 votes; whereas, the petitioners allege and charge that the said Lewis C. Cassidy received not more than 32,915 votes, and William B. Mann received at least 34,399 votes for said office, whereby the petitioners allege and charge, and believe that the said William B. Mann has received the highest number of votes for said office, to wit, at least 1484 votes more than the said Lewis C. Cassidy, is elected to the said office, and should have been so returned. This is a direct charge of a false and fraudulent election and return; it sets out the number of votes returned for each candidate, and states the number actually received by them respectively, claiming a difference in favor of William B. Mann of 1484 votes, which number would greatly exceed the majority of 551 votes returned as received by Lewis C. Cassidy. If the facts thus stated be proved, it is manifest that the result of the election, as returned, will be changed, and Mr. Mann, as the person receiving the greater number of votes, will be entitled to the office. The petition then contains certain specifications, each of which, from the 3d to the 46th, indicates a particular ward and the election division in such ward, in which votes were illegally received for Lewis C. Cassidy, from persons not qualified to vote, and also states the number of votes so received. The whole number of illegal votes stated in the several specifications greatly exceeds the majority returned for



(Striking out specifications.)

Mr. Cassidy. The petition thus distinctly charges fraud in the election and return; it points out the polls at which the fraud was committed, the manner in which it was effected, and the number of illegal votes fraudulently received. This would seem to be all that the law requires; it is a precise statement of facts which, if sustained by proof, would change the result of the election.

But it is contended, that greater precision should be required; that the petitioners should be obliged to set out their full knowledge; that they should give the name of every illegal voter, and the specific reason why his vote was illegal. For such a degree of strictness no analogy in pleading has been shown. In a *quo warranto*, to which, it is said, the supreme court, in Sheetz's Case, compared this proceeding, no such extreme precision is necessary; in election cases before committees of parliament, in England, special statutes were required to direct the character of the information to be given by the contesting parties. We remember no instance in pleading, in which it is necessary to set out, not only the claim or injury alleged, but the means and manner, and character of the proofs to be adduced in support of the charge; if such strictness were required, the slightest mistake would be fatal. The specifications in this case come up to the requirements of the law, as indicated in former decisions. In Kneass's Case, 2 Pars. 553, the sixth specification which, as amended, was sustained, is identical with that now under consideration; a list of names was there appended, which the court subsequently pronounced to be unnecessary, regarding it only as proof. If that case was properly decided, it rules the point now under consideration.\*

We are aware of the extreme difficulty of exercising this jurisdiction; party feeling affects the very atmosphere which surrounds us; no one looks calmly on, and there is danger in being led into extremes; *in medio tutissimus*.

\* And see Weaver v. Given, 1 Brewst. 140; Batturs v. Megary, Ibid. 162.

(Striking out specifications.)

Let it be known that an election fraud must not only be discovered, but that every individual engaged in it must be ascertained and named, before a step can be taken to establish it, and the chance for a fair election will be more and more remote. We cannot throw this shield around fraud. Believing that this petition contains those statements of fact which the law directs this court to investigate, and which every decided case asserts to be matter proper for investigation, our duty is to proceed with it. We do not relax our rules, but consider that this case is clearly governed by the propositions derived from adjudged cases.

The specifications from the 46th to the end of the petition are similar to each other, alleging frauds of a similar character, in different divisions of the several wards named therein. The first fraud charged is alleged to have been committed by a majority of the voters, at the election for inspectors, in the spring of the present year, in choosing two inspectors of the same political views. Doubting very much whether such a choice of inspectors constitutes a fraud, it is sufficient to say, that no effort was made, in proper time, to set aside the election for such inspectors, and we certainly cannot examine its validity in a collateral proceeding; this would be contrary to all legal principle, and be inconsistent with the meaning of the law which regulates this subject, and which requires a direct proceeding to contest an election,\* always presuming that to have been fair which has not been legally questioned; we can, therefore, receive no evidence on this point, and it must be stricken from the petition.

The next charge is, that the said inspectors and judge did *fraudulently* receive 200 votes, which were counted for Lewis C. Cassidy, from persons not qualified to vote. This is the same charge as made in the 7th specification with the addition of the word "fraudulently;" it is not perceived

\* This law has provided no direct proceeding for contesting an election of judges and inspectors. Scranton Borough Election, 1 Luzerne Legal Obs. 12.

(Striking out specifications.)

that the charge of fraud, thus made, will render the receipt of illegal votes any more efficient to change the result of the election. The first charge made in the petition is, that the election and return are false and fraudulent, and the evidence showing such votes to have been fraudulently received, may be given under the first specification relating to the same district, each of such specifications being understood to point to a special instance of the general fraud charged.

The next class of charges in this specification alleges, that the said election officers fraudulently refused to perform those acts which the law requires them to perform in conducting an election; but it is not therein alleged that the effect of this fraudulent refusal and neglect was, to change the result of the election for district-attorney. It has been settled, that the allegation of a fraud perpetrated by the officers of an election, is not sufficient to authorize the court to set aside an election, unless it be also stated that, by such fraud, the true declaration of the will of the people has been prevented. If this were not required, dishonest officers would have it in their power, by fraudulently neglecting the required formalities, to set aside an honest election.

The election officers are next charged with having fraudulently received the votes of non-residents, &c. This allegation is not sufficiently definite, as it neither states that such votes were received for district-attorney, nor the number of such votes, so that the effect upon the result can be ascertained. The same remark applies to the allegations of having fraudulently received the votes of persons who personated others, some of whom were dead, and of having permitted the same persons to vote several times; the number of such votes is not stated, nor their effect upon the result of the election. The following charge of omission to file the tally-papers within the time required by law, can have no effect upon the number of votes, and is not material.

(Striking out specifications.)

The concluding allegation of this specification, that the election in said division was not a fair election, held according to the intent and spirit of the law, but was a fraud contemplated and directed by the majority of voters in said election division, and carried on by the election officers, who were the agents of the said majority, is a repetition of the charge first stated in this specification, which charge has already been disposed of, as a matter not within the scope of the present proceeding. Were we to attempt to investigate such a charge, we would be at a loss to understand, how an election held at a time and place prescribed by law, could be shown to be a fraud contemplated and carried on by the majority of the voters. There is a want of intelligibility in such a proposition, which affords an additional reason for excluding it from the petition.

This whole specification, the separate allegations of which we have thus briefly considered, we can view in no other light than as a charge of conspiracy entered into by the majority of the voters of the election division, to perpetrate a fraud; the means to be employed are stated, but the only definite result arrived at, so far as it can affect the case before us, seems to be, the reception of 200 illegal votes for Mr. Cassidy. Assuming that the facts stated could be fully proved, would it be our duty to consider the election thus conducted, entirely void, and to disregard and throw out the returns, or should we deduct the votes fraudulently received from the number returned for the party for whom they were counted? Where the latter course *can* be pursued, it seems not only consonant with justice, but in pursuance of the law which requires us to determine which of the candidates has the greatest number of votes; the votes of honest electors are not thereby lost, and they disfranchised. This course has been heretofore pursued by the court in similar cases, and great pains have been taken to ascertain and correct the fraud,

(Striking out specifications.)

rather than to disfranchise the citizens of an entire election district.

Adopting this principle in the present case, we do not perceive that any benefit can result from retaining in the petition any part of the specification under consideration, and the same is stricken out. This ruling applies to all the specifications after the 46th. The petition thus expurgated will embrace the specifications from No. 1 to No. 46 inclusive; and as there is sufficient therein, if proved, to change the-result of the election, the motion to quash, because the 1st, 2d and 43d specifications do not contain matters sufficient for that result, must, of course, be refused.

---

It was ruled in an early case, that where some of the grounds alleged in the petition were mere irregularities, which, if sustained by proof, would not be sufficient ground for a setting aside the election, the court would strike out such allegations, and would not put the respondent to the trouble of taking proof. *Kneass's Case*, 2 Pars. 553. Thus, a specification merely alleging the absence of tally-papers and praying for a recount, was stricken out as immaterial. *Thompson v. Ewing*, 1 Brewst. 68. So was a specification charging fraud in a prior election at which the election officers were chosen. *Weaver v. Given*, Ibid. 140. But in the late cases which have come before the court that decided *Kneass's Case* and *Mann v. Cassidy*, that court has departed from the wholesome rule laid down by their predecessors, and has refused to strike out specifications charging a disregard of the directory provisions of the election law, by the officers of the election. *Batturs v. Megary*, 1 Brewst. 162. And see *Thompson v. Ewing*, Ibid. 68; *Weaver v. Given*, Ibid. 140. This departure from the ancient landmarks is but another proof of the vicious policy of vesting discretionary powers, in political cases, in an elective judiciary holding office for a limited term of years. We do not expect superhuman virtue from frail men, and it is utterly impossible that in such cases the scales of justice should be held with an even hand; political prejudice, the fear of offending the body of their partisans, and a thousand other causes combine to destroy the independence of the courts in political causes. And we do not hesitate

(Issue and recounting of ballots.)

to re-assert that no greater danger exists to the permanency of our free institutions than this discretionary power of the judges; it is wholly incompatible with political freedom.

The right to strike out incompatible specifications was asserted by the supreme court of Pennsylvania, in *Ewing v. Filley*, 43 Penn. St. R. 384. Regularly, the motion to strike out should be submitted before the evidence is gone into; but the right to move to strike out may be reserved. *Thompson v. Ewing*, 1 Brewst. 68.

---

## KNEASS'S CASE.

In the Court of Quarter Sessions of Philadelphia.

DECEMBER SESSIONS 1850.

(REPORTED 2 PARSONS 599.)

[*Issue and recounting of ballots.*]

An issue to a jury will not be directed, to try the question of an alleged fraud in an election.

An application for a recount of the ballot-boxes will not be granted, unless some specific mistake or fraud be pointed out in the particular box to be examined.

KING, P. J., delivered the opinion of the court. I will notice two matters which occurred during the hearing, on which my opinion was expressed against the respondent, and which I have since fully reconsidered; these are, the application made to the court to award an issue, in order that the whole case might be submitted to a jury; and the request that the court would direct a general recount of all the ballot-boxes of the city and county of Philadelphia.

I. As to the first, I remain of opinion, that it is inadmissible in principle, and even if so admissible, that it was, in this instance, made out of time. The legislature, in clothing this court with the powers of an election com-

(Issue and recounting of ballots.)

mittee, in cases of contested elections, contemplated a prompt and immediate termination of such exciting conflicts, without subjecting them to the delay incident to technical actions at law; so far has the law giving us the power, gone, that all right of reviewing our proceedings and decisions is taken away from the supreme court, our determination of every question arising, being absolutely "final and conclusive." If we should now accord this request to the respondent, we, of course, must do so to every other contestant or respondent in an election contest, involving disputed questions of fact; under such a system, what becomes of the promptness of action and decision, demanded by the public interest and feeling, contemplated by the legislative provisions? Delay must take place in preparing and setting down such an issue for trial; after a trial of the most tedious and expensive kind, the jury may disagree (one dissenter from the rest being adequate to produce that result), and their consequent discharge; another and another trial may follow, with like results, until one of the parties, weary with delay, or bankrupt in prosecuting his rights, abandons them in despair; should a jury ever agree, either party might, during the trial, claim bills of exception to the admission or rejection of testimony; writs of error might follow, and the litigation be thus further protracted. A system tending to such results, might suit the party having the return, who, in the meantime, holds the honors and receives the emoluments of the office; but it would operate most unjustly to the contestant, if rightly entitled to the return. The law gives us the power of a legislative election committee: how would a proposition be received, made to such a committee trying the contested election of a governor, a judge of the supreme court, an auditor-general or any other of the high elective officers of the state, to cause proceedings to be instituted in a court, to try the question before them by jury? As I doubt such a

(Issue and recounting of ballots.)

proposition ever being seriously made, I am at a loss to suppose how it would be seriously answered.

But this application came too late, if it had been admissible under appropriate circumstances. This investigation commenced on the 12th of February, and had been progressed in until the 7th of March, when this application was first made; all the contestant's witnesses in chief, amounting to hundreds, and part of the respondent's, had been heard; if a jury trial had been desired or contemplated by either party, ought it not to have been demanded at the outset of the proceedings? The specifications admitted clearly pointed out, that questions of fact, and grave questions, too, were involved in the inquiry; so that it cannot be argued, that the knowledge of such questions existing in the cause, was only disclosed by the examination of the witnesses. Under such circumstances, would it be just in a court to adopt a practice that would permit a party to delay his application for a jury trial, until all his adversary's case had been fully disclosed to him, and then grant it? Such a delay alone, in my opinion, affords, in itself, an adequate reason for refusing the application, if none other existed.

To a court, the reference of such a question to a jury, might be a grateful and desirable transfer of an oppressive public duty, to a body not directly responsible to the people. But would this be an execution of the duty imposed upon the judges by the law? or would it not be an evasion of it?

II. In reference to the application made to us, to order a recount of all the ballot-boxes of the city and county, I remain of the same opinion as that originally expressed when the motion was made; I believed it then, and I believe it now, inadmissible in principle; and even if admissible, not to have been made in a suitable stage of the proceedings. In the case of the contested election of sheriff Lelar, we held, after full argument and deliberation, that to induce us to order a recount of all the ballot-boxes of a county election, something definite must be



(Issue and recounting of ballots.)

preferred against each; and that we could not, on a general allegation of errors believed to exist in all, authorize the perilous experiment of testing every election return, by the count of the ballot-boxes of every district in the county. We then refused to Mr. Deal a recount of all the ballot-boxes of the city and county, because, although he complained of general errors in the count of all, he designated particulars in none. We refused this apparently reasonable request, from a deep sense of the danger that would follow, if we should too readily accede to such plausible requisitions; we saw that if we once acquiesced, on general allegations of error in the count, we would be bound by the result of such a count, and that thus we might be made the instruments of defeating the popular will, by affording convenient means of accomplishing it. We knew we were bound to order an examination of the boxes, and a recount of the ballots, whenever the return of a particular election district was assailed, for causes stated with sufficient precision to induce us to entertain a complaint preferred against it; we felt that further than this it would be unwise to go, and on that ground our foot was placed, from which it never since has been, nor ever will be moved.

The contestant, in his original petition, demanded such a recount, for supposed error, stated in the same way as has been done by the respondent; this was refused by the court, although accompanied with precise allegations affecting particular districts, judged by us to be adequately stated to authorize an inquiry into them; surely, we cannot now accord to one party, that which, from great public considerations, we refused to the other, though asked at the outset of this investigation. But, as in the instance of a demand for a trial by jury, I am of opinion, that this demand for a recount was not made at the appropriate time.

CAMPBELL, J., dissented.\*

\* See 1 Phila. 169-70.

(Issue and recounting of ballots.)

That the parties have no right to claim an issue, in a contested election case, was decided by the supreme court of Pennsylvania, in *Ewing v. Filley*, 43 Penn. St. R. 389; it was there said, by Lowrie, C. J., delivering the opinion of the court: "It is objected that the act of 1839, instituting this form of proceeding, is unconstitutional, in so far as it deprives a party, claiming a right to a public office, by a popular election, of a trial by jury of all disputed facts. If this objection is well founded, then every step in the official organization of the state, or in the perpetuation of its organization, might stand in need of the sanction of a jury, and is potentially subject to the delays and expense of a jury trial, except in the election of governor and members of the legislature, in relation to which the constitution makes special provision. Then all the laws providing for contested elections of councilmen in every city and borough of the state, are unconstitutional; then all the numerous laws regulating the manner of contesting election returns of judges, prothonotaries, registers, district-attorneys, justices of the peace, constables, military officers, and all state, county, town and township officers, except governor and members of the legislature, are unconstitutional and void; and contrary to the practice of the people and their officers in all departments, the state cannot organize itself without the aid of juries; then also the act of 1799, which made the governor the judge of contested elections of sheriffs and coroners, was unconstitutional. This objection, therefore, has a fearful sweep, if it has any force, and we should stand appalled before it, if we should feel its force to be equal to its pretensions. We do not feel it so. It is not in the act of organization of the state, nor in the perpetuation of its organic succession, but in the administration of rights under the organization, that the constitution secures the trial by jury. The jury is the popular element in the determination of rights which need enforcement by means of the state organization; but there is a much larger popular element in our elections, the votes of all the people; and all our political practice shows that we have not considered a jury an essential means of deciding contested elections of public officers. We see nothing but inexpediency, to prevent the legislature from declaring that the process of election should end with the general return, and that that should be conclusive evidence of title to office or commission; but they have wisely chosen not to do so, and have appointed the court to finish the process, if the general return be contested, by a proper review of the

(Issue and recounting of ballots.)

return of the election officers; and as they have not required that the court should have the aid of a jury for this part of the process, any more than for any previous part, no such aid can be demanded, of right, by either party, nor is it allowable." A jury trial was likewise refused in *Thompson v. Ewing*, 1 Brewst. 67, 96.

It has been determined, in Alabama, that the ballots themselves are higher evidence of the number of votes cast, than the certified lists of the election officers, and that the lists may be corrected by them. *State v. The Judge*, 13 Ala. 805. But the decision in *Kneass's Case* was adhered to, in Pennsylvania, in *Thompson v. Ewing*, 1 Brewst. 67, 97, where it was said, that in no case will the court order a recount of the ballot-boxes, except on a specific allegation of fraud. "The sworn return of the officers," said Judge Thompson, "should not be swept away in this manner." Nor, it seems, will a recount be ordered merely on an allegation of fraud, until some evidence be adduced to sustain it. *Ibid.* 98; *Kline v. Myers*, 2 Cong. Elect. Cas. 574.

# REED v. KNEASS.

In the Court of Quarter Sessions of Philadelphia.

DECEMBER SESSIONS 1850.

(REPORTED 2 PARSONS 584.)

[*Competency of witnesses.*]

An elector is not bound to disclose for whom he voted.

But this is the privilege of the voter, and one that he may waive; if he voluntarily testify for whom he voted, he is a competent witness to do so.

The petitioners in a contested election case are competent to prove for whom they voted.

KING, P. J., delivered the opinion of the court. To prove the undueness and falsity of the returns in two of these districts, the election district of Penn, and the Second ward, Moyamensing, 230 witnesses have been examined, to show that they actually voted for W. B. Reed, for the office of district-attorney, whereas, according to the official returns, he received but 120 votes in both. Of these witnesses, ten were among the petitioners complaining against the return of Mr. Kneass as undue and fraudulent. In regard to this testimony, two questions have been raised: 1. It has been contended that, according to the constitution of Pennsylvania, the testimony of a citizen is not admissible, in any case, to show for whom he gave his ballot, at an election: 2. That a petitioner, contesting an election as undue and fraudulent, is not a competent witness, because of supposed interest, resulting from his liability under certain circumstances, to the payment of the costs of proceeding.

I. The first question arises under that clause of the constitution which declares that "all elections shall be by ballot, except those by persons in their representative capacity, who shall vote *vivâ voce*." The respondent con-

(Compétency of witnesses.)

tends, in order to exclude the testimony of these witnesses, that this provision was not simply intended as a security to the elector for the free and independent exercise of the right of suffrage, but, from considerations of public policy, it operates to prevent the voter, under any circumstances, from disclosing, before a judicial or other tribunal, how he voted.

If a voter be excluded from proving the contents of his ballot, from considerations of public policy, which require that such ballot should ever remain secret, the fact as to how he voted cannot be proved in any way; because the policy which excludes proof by himself, equally applies when it is proposed to be given by a third person. It, therefore, would follow, from the position assumed, that, under no circumstances and in no manner, can the contents of a ballot, given by an elector, be proved, in Pennsylvania, even though the elector himself be willing and anxious to make such proof, in order to show that his true ballot has been suppressed or changed by those whom the law authorizes to receive and requires faithfully to report it. This is a startling proposition; and it is not the less so, from being now, for the first time, asserted in this state; in which the vote by ballot, in forms variously modified, has prevailed from the earliest periods of our political history. No statesman, no legislator, no judge has ever suggested it; and the universally received public opinion always has been, that the vote by secret ballot was a means devised to secure to all citizens, poor or rich, humble or lofty, the free and independent exercise of their own judgment, in the choice of public agents, and in the expression of their opinion of public men and public measures. So understood, the vote by secret ballot is an efficient means of maintaining the great republican principle, that all governments derive their legitimate authority from the consent of the governed; expressed without restraint, coercion or intimidation. But like all other personal privileges, the seal of secrecy may be taken

(Competency of witnesses.)

off his ballot by an elector, whenever circumstances exist which, in his judgment, require it to be done; and surely, none more urgent can exist, than when the elector wishes to make such a disclosure of his vote, in order to vindicate it from gross errors or fraudulent practices, which have, in effect, deprived him of it.

The only precedents found in the history of the state, show this ever to have been the opinion of Pennsylvania statesmen, legislators and judges. In the case of the contested election of Frederick Wolbert, as sheriff of this county, which occurred in 1807, the testimony was taken by commissioners, among whom was Mr. Reed, the late recorder of this city, and Judge Hallowell, my immediate predecessor as president of this court; some of the witnesses appear to have voluntarily testified for whom they voted for sheriff; but all seem to have been told by the commissioners, that they might answer such a question or not, at their pleasure. The report of these commissioners was submitted to and acted upon by Governor McKean, who had been long chief justice of the state, and was a member of the convention which framed the constitution of 1790, where the existing provision respecting the vote by ballot is to be found. If the statesmen and lawyers of that day had entertained any such idea as that now urged on us, it scarcely would have failed to strike a mind of the keen perceptions possessed by that eminent man.\*

In the case of the contested election of Thomas S. Bell, senator from Chester and Montgomery counties, which occurred in 1838, the question was suffered to be put to the various witnesses, as to how they voted for senator; the witnesses declined answering, and of course, were not coerced; the senate committee, composed of gentlemen of both political parties, men of distinguished character and great public experience, unanimously reported that it was

\* Every day's experience shows the utter worthlessness of such *sub silentio* decisions, as those cited.

(Competency of witnesses.)

a constitutional privilege of the voter to decline replying to a question as to how he voted, and that he could not be compelled to disclose it, *though he might waive the privilege at his own discretion*.\* And this reasoning is certainly in harmony with the received opinion of the state, before or since. Although the vote by ballot prevails in most states of the union, the industry of counsel has not been able to produce a single authority, legislative or judicial, denying the principles stated in the report of the senate committee in the case of Mr. Bell; the same result has followed all the investigations I have since been able to make.

The points adjudged in the two cases, cited from the New York and Michigan reports, do not seem to me, directly to touch the precise question presented by the objection taken to these witnesses, which is, whether a voter can, under any circumstances, prove, of his own free will, how he voted by ballot at a public election.

The case of *People v. Ferguson*, 8 Cow. 102, involved the question whether a citizen could be heard to prove that, in depositing a ballot for H. F. Yates, he meant to vote for Henry F. Yates, one of the candidates at the election. This, the supreme court of New York adjudged him competent to do, considering the oath of the elector higher evidence of what he intended to do, than the opinion of any other person judging merely from the face of the ballot. Of course, the court must have considered him competent to prove how he voted by ballot, otherwise he could not have explained what his ballot meant. The direct question before us seems to have been taken for granted.†

\* The latter point was not in any shape before the committee, as the witnesses had declined to answer.

† It is now held, in New York, that a voter may testify for whom he voted; and he may also be asked for whom he *intended* to vote, as a circumstance tending to prove for whom he did actually vote. *People v. Pease*, 27 N. Y. 45, 72. His mental purpose, however, in depositing his ballot, is

(Competency of witnesses.)

The Michigan case, *People v. Tisdale*, 1 Doug. 59, arose under similar circumstances, the court ruling directly opposite to the previous decision in New York. The ground, however, on which the decision rests is, that the intention of the voter in giving his ballot is to be collected from the face of the ballot itself, and cannot be proved by parol. It is simply the application of the ordinary rule of the law of evidence, that the intention of a written instrument cannot be explained by parol, but that the instrument must speak for itself.\* The point before us is of quite a different character; it is not, whether an elector can be permitted to prove how he *intended* to vote by a particular ballot, deposited by him, but what ballot he actually deposited; the testimony is offered, not to prove an intention, but to establish a fact.

It is not pretended, that there is any direct constitutional injunction, legal provision, or judicial decision of Pennsylvania, which excludes the testimony of electors offered under the circumstances of this case. The propriety of excluding them is supposed to flow from public policy; because of the danger of perjury; and because permission being given an elector to prove his ballot, might be used as a means of extracting from him how he voted, and thus affect the principle of the secret ballot. I do not deny, that obvious considerations of public policy might justify a construction of a law or a constitution to an extent not necessarily required by the letter of either; but such considerations must be manifest and convincing; this, I suppose, will be admitted. I will first test the reasons urged in favor of the proposed construction of the constitution by this rule; I will then examine whether there

not admissible, as an independent fact; his intention is to be inferred from his acts. *People v. Saxton*, 22 N. Y. 309. The point stated in the text was re-affirmed in *People v. Cook*, 8 N. Y. 67.

\* This point was re-affirmed, in Michigan, in *People v. Higgins*, 3 Mich. 233, and *People v. Cicott*, 16 Mich. 283. And see *State v. The Judge*, 13 Ala. 805.



(Competency of witnesses.)

are not political considerations of infinitely greater force, which demand an exactly opposite construction of the clause. If either or both tests show the position of the respondent to be unsound, it must necessarily be rejected.

The apprehension of perjury, if a legitimate objection, in itself, to a witness, might exclude every witness, in every cause, inasmuch as there is none in which a witness, if he be sufficiently profligate, may not swear falsely; such an apprehension can never operate to exclude a witness otherwise competent. I grant, that when the temptations to perjury are manifestly great, the tribunal called upon to give credit to a witness so circumstanced, should examine his testimony closely; in such cases, the exception goes to the credibility rather than the competency of the testimony. This reason, in my opinion, forms no adequate objection to the admission of these electors as witnesses.

As to the effect of such a disclosure, made by an elector, on the principle of the secret ballot: if the elector could be compelled to disclose his vote under any circumstances, the danger deprecated is readily appreciable; but when an elector comes into a court of justice ready, willing and anxious to testify as to his vote, in a proceeding instituted for its vindication, it is difficult to extract from such a state of things the idea of putting in peril the sanctity of his ballot. An ingenious mind may, indeed, be able to fancy instances in which permitting a voter to be interrogated as to his ballot, with his own consent, might be used to his injury; but the *possibility* of such a result cannot, certainly, deprive him of the right to disclose his ballot, when the direct object of that disclosure is to protect it.

Assuredly, such speculative dangers bear no comparison with the real ones which might arise from the falsification of a voter's ballot, and the impunity which would follow, if courts or legislatures should refuse to suffer an elector to prove how he voted, in an inquiry like the present. Let the doctrine be once established as constitutional law, that an elector cannot be heard, in such a case, to prove

(Competency of witnesses.)

how he voted, in order to establish the falsity of an election return, and the suffrage of every man in the commonwealth is placed under the control of the election officers, who may make him appear to have voted exactly as they please. According to this doctrine, if five out of six hundred voters, in a given district, should vote for one candidate, and their votes should all be returned as given to another, no adequate means exist in any body, legislative or judicial, in the commonwealth, to relieve against so crying a wrong; for, by refusing to hear the testimony of the electors to prove how they voted, the establishment of the fraud, in such case, would be impossible; and yet this doctrine is seriously urged upon us as a preservative of the sanctity and security of the vote by ballot. This would be a mode of guarding the elective franchise of the good people of the commonwealth, which their straightforward common sense would surely reject and repudiate.

So far from this construction of the constitution tending to preserve and perpetuate the vote by ballot, it would inevitably lead to its extirpation from our political system; for what independent and reflecting man would rest satisfied with a system which subjected his most precious political rights to such abuses, without means being afforded him to detect and redress them? What tempting facilities would be afforded, under such a system, to unscrupulous partisans, to deal with the ballot-boxes so as to make them express their own rather than the sentiments of the true and honest electors! We have been admonished as to the danger which might result from the influences of wealth and power, operating on the cupidity or the fears of electors, so as to induce them to misrepresent the manner in which their votes were actually given, if permitted to testify in a proceeding like this; but is not the peril infinitely more imminent, that wealth and power may operate on four or five election officers, so as to induce them to falsify a return, which the construction proposed would render, in effect, conclusive? One of the strong arguments

(Competency of witnesses.)

in favor of universal suffrage is, the absolute impossibility of corrupting a large constituency. The system proposed would avoid the necessity, by confining the operation of such corrupting influences to a select few, whose assertion, in the form of an election return, is made so sacred, that the oaths of hundreds or thousands of citizens cannot be heard in contradiction to it, simply because such citizens are electors, and may all be perjured.

All arguments which, in my opinion, can be drawn from sound and practical policy, are in favor of the receipt of the testimony objected to. The true policy, to maintain and perpetuate the vote by ballot, is found in jealously guarding its purity; in placing no fine-drawn metaphysical obstructions in the way of testing election returns, charged as false and fraudulent; and in assuring to the people, by a zealous, vigilant and determined investigation of election frauds, that there is a saving spirit in the public tribunals charged with such investigations, ready to do them justice, if their suffrages have been tampered with by fraud, or misapprehended through error.

II. The remaining question is, as to the competency of petitioners to prove how they voted. In the view I take of this case, this question is not of practical importance in the decision, because, if the testimony of the petitioners objected to, eleven in number, should be stricken from the record, the result I have arrived at would be the same.

The objection to the petitioners is put on the ground, that they are parties to the proceeding, or interested in its results, being liable, under certain circumstances, to the payment of the costs. But the petitioners, in an election contest, are not the parties; this is settled by the 159th section of the election law, which enacts, that "in all contested elections, as aforesaid, the person returned, and the candidate next highest in vote, shall be the parties in the trial thereof." The objection to the petitioners, on the ground of their liability to costs, rests on that clause

(Competency of witnesses.)

of the election law under which we may, if convinced that the petition has been prosecuted without probable cause, award a certificate to that effect; in which event, the petitioners would be liable to costs. This is not like the liability of an individual, subject absolutely to the payment of costs, if the case terminate one way; the dismissal of the petition does not involve the payment of costs by the petitioners; to produce such a result, we must certify the proceedings to have been without probable cause. An interest disqualifying a witness, must be some legal, certain and immediate interest, however minute. Where, however, he has but a probable interest, this goes only to his credibility, and not to his competency. 1 Greenl. Ev. §§ 386, 400.

The liability of petitioners in election contests, is not as direct as that of prosecutors in indictments for misdemeanors. In all this great class of cases, the jury which determine the issue *must*, in the event of an acquittal, decide whether the prosecutor, the defendant or the county shall pay costs. The law has been in force for near fifty years, and thousands of prosecutors have been examined in our courts, as witnesses, without a doubt ever having been entertained of their competency, although under a contingent liability for costs, if their complaints should be adjudged vexatious or frivolous. There are other cases of a public character in which witnesses having even a direct interest in the result are heard. Thus, a witness who is to receive a reward from government, consequent on the conviction of an offender, is nevertheless competent;\* so, a prosecutor, when part of the sentence following the conviction, is the restoration of property feloniously taken from him, is still a competent witness.† And why do these apparent anomalies exist? Because the proceedings on which such witnesses are heard, are public, affecting the peace, order and common safety of

\* United States v. Wilson, Bald. 78.

† United States v. Murphy, 16 Peters 203.

(Competency of witnesses.)

society; and can anything exist in which the community have a deeper interest than the purity and accuracy of the ballot-box, the foundation of our whole political system, and which, if not preserved intact, may end in its subversion? If public policy ever could authorize a modification of the rule which excludes a witness having the most minute but direct interest, this is surely the case.\* But this, however, is one in which the liability is uncertain and contingent.

This reasoning would have applied, had the petitioners been offered as witnesses for every purpose of the case; but they were offered only to prove for whom they voted. My brother Kelley, in expressing his views in favor of the admission of the testimony for this purpose,† placed its admissibility on the ground of absolute necessity; he assimilated the case to that of one whose property has been stolen from a public-house, or from a railroad-car or steamboat, or where such property has been destroyed by a mob. He truly says, that "if absolute necessity admits a departure from the ordinary rules of evidence in these cases, how much more absolute is the necessity for admitting a petitioner to prove how he gave a ballot; a thing, of course, existing in his exclusive cognisance." To this it may be urged, why should such persons become petitioners? The answer is obvious; it is only the persons who have the required knowledge, that can properly present a complaint; two of them, at least, must swear to its truth, and all of them, certainly, should have a moral consciousness, that its allegations, from facts within their own knowledge, are well founded.

The practice of committees in contested elections, in the English house of commons, has been cited; this, it seems, excludes petitioners from testifying.‡ Such a

\* See *Cornwell v. Isham*, 1 Day 35; *Hindson v. Kersey*, 1 Day 80 n.

† 1 Phila. R. 162.

‡ 3 Dougl. 165; Tomlins 129. In England, a voter, who is not a petitioner, whilst deemed incompetent to establish his right to vote (1 Lud.

(Competency of witnesses.)

practice can surely have no binding obligation in a Pennsylvania court of justice. The precise question here involved, to wit, whether an elector, also a petitioner, is a competent witness to prove how he voted by secret ballot, never could present itself to such a committee, the vote by ballot being unknown to them. I am, therefore, of opinion, that, for the reasons assigned, no error was committed, in admitting the eleven petitioners to prove how they voted, which was all that was done.

CAMPBELL, J., dissented.

---

That a qualified elector cannot be compelled to disclose for whom he voted, is a point well settled by authority. *Easton v. Scott*, 1 Cong. Elect. Cas. 272. It was said by the circuit court of Pennsylvania, held before Yeates and Smith, JJ., in 1800, that "no citizen is compellable to declare how he has given his suffrage." *Respublica v. Ray*, 3 Yeates 66. And so far has this principle been carried, that a qualified elector who voted after the legal time for closing the polls, was held to be protected, although his vote was an irregular one, and not entitled to be counted in the returns. *Case of Locust Ward Election*, 4 Penn. L. J. 341. It does not, however, protect one who has voted, not being a qualified elector; such a person is a mere intruder, and entitled to none of the privileges which appertain to legal voters. *McDaniels' Case*, 3 Penn. L. J. 310 (ante 246). In Michigan, the protection of the secret ballot is extended so far, that not only cannot a legal voter be compelled to disclose for whom he voted, but no one else is permitted to give testimony upon that point, unless the elector himself have, at the time of voting, made the contents of his ballot public, by his own consent; no knowledge of its contents, obtained without his consent, is admissible; nor is evidence of his own statements concerning his vote, whether made before or after casting it, unless accompanied by an exhibition of its contents. *People v. Cicott*, 16 Mich. 283. In Penn-

---

388; Tomlins 123), is admitted as a competent witness to prove for whom he voted, in order to correct a mistake of the entry in the poll-book. 2 Lud. 405; Tomlins 46, 126.

(Competency of witnesses.)

sylvania, however, testimony *aliunde* is admitted to prove how a particular elector voted. *Read v. Kneass*, Pamph. Trial 17. In congress, the testimony of the voter himself is received, to prove his own vote. *Loyall v. Newton*, 1 Cong. Elect. Cas. 522.

The rule appears to be equally well settled, that where a person has voted illegally, he is bound to disclose, on oath, for whom he voted, or the fact may be established *aliunde*. *McDaniels' Case*, 3 Penn. L. J. 310 (ante 246). But this power will not be exercised by the courts, unless the illegality of the vote be free from doubt; the seal of secrecy affixed to it by the constitution ought not to be broken, except in a very plain case. *Case of Locust Ward Election*, 4 Penn. L. J. 349. In Michigan, it is said, that where a voter's qualifications are disputed, the same protection from scrutiny into his ballot, is to be preserved, so long as there is any controversy as to his legal right to vote; but that when the illegality of his vote is not in controversy, such immunity ceases, and the contents of his ballot may be proved, without his consent. *People v. Cicott*, 16 Mich. 283. In Wisconsin, it is decided, that the privilege of refusing to testify for whom the witnesses voted at an election, is strictly confined to those who were legally entitled to vote at such election, and does not extend to those whose votes were received in violation of the registry law. *State v. Hilmantel*, 23 Wis. 422. An illegal voter, however, may decline to answer for whom he voted, on the ground that it might criminate himself; but in such case, the contents of his ballot may be shown by other testimony. *State v. Olin*, 23 Wis. 309; *Mann v. Cassidy*, Pamph. 69-70. The election law of Pennsylvania of 1839 expressly provides that a committee of the legislature, on the trial of a contested election case, may compel any person, not a legally qualified elector, who voted at such election, to disclose, under oath, for which of the respective candidates he voted. *Purd. Dig.* 390.

## HOWARD v. SHIELDS.

In the Supreme Court of Ohio.

DECEMBER TERM 1865.

(REPORTED 16 OHIO STATE REPORTS 184.)

[*Election papers.*]

A regular and perfect tally-list is *primâ facie* evidence, on a contested election, of the votes therein set forth.

If the judges or clerks of an election omit to sign the poll-books or tally-sheets, to fill up blanks in the caption, or to state the aggregate number of the voters, these and the like omissions may be corrected by parol; and the documents, when so corrected, are competent evidence of the result of the election.

Error to the Common Pleas of Brown county. The facts of the case are stated in the opinion of the court.

*Louden and Sloane*, for plaintiff in error.

*Thurman*, for defendant in error.

WELCH, J., delivered the opinion of the court. The original case was an election contest; Howard had been declared elected sheriff of Brown county, and Shields, an elector and rival candidate, contested his election, under the provisions of the statute on that subject. In the common pleas, the contest was decided in favor of the contestant, and he was declared duly elected; to reverse this judgment, the present petition in error is presented.

The errors assigned are numerous, but may be substantially reduced to three: the first is, that the court erred in overruling the motion of the respondent to dismiss the case, for uncertainty and insufficiency of the notice of contest. (The learned judge, after a full consideration of the sufficiency of the notice, under the Ohio statute, proceeded as follows:)



(Election papers.)

The second error assigned is, that the court rejected the tally-sheets and poll-books of three several elections held in the army, under the acts passed for that purpose. These tally-sheets were in conformity to law, and unobjectionable. The defects in the poll-books accompanying them were, that the number of voters was not stated at the foot, and did not appear otherwise than by counting the names, and that they were not signed by the judges and clerks; in other respects they are regular and according to law. The names of the judges and clerks are recited in the caption of the poll-books, and are signed to the affidavit which stands immediately below the place where they should have signed the poll-books. These tally-sheets were received and counted by the county-canvassers, and form part of the abstract made out by the clerk; the record shows that they were rejected by the court below, together with so much of the abstract of the county-canvassers as consisted of the votes therein evidenced. In rejecting these papers, we are satisfied the court erred. The tally-sheet alone makes a *prima facie* case; it is upon the tally-sheets alone that the county-canvassers declare the result; the poll-books are not sent to them. If the tally is good before them, it should, until impeached, be good before the court; the policy of the law seems to be, that, until the contrary is shown, the tally-sheet shall be taken and considered as a true statement of the number of legal votes cast for each candidate; of course, it is open to be impeached by the other party; but it is hardly necessary to say, that an informal or defective accompanying poll-book, in no way contradicting its statements, is not an impeachment.

If, however, the poll-books were indispensable, was there not, substantially, a sufficient signing to make them valid as such? The judges and clerks signed the affidavit; we have, then, their oaths and their signatures; would an additional signature add anything to the verity of the paper? I think not; I think the requirement to sign at

(Election papers.)

the foot, and the requirement to state the whole number of votes (a matter which can be obtained from the body of the poll-book), should be considered as merely directory, and not as absolutely essential. The original act, which requires the county-canvassers to make their abstract from the poll-books, and not from the tally-sheets, declares, that "no election shall be set aside for want of form in the poll-books, provided they contain the substance." 1 S. & C. Stat. 539, § 33. If these were defects in substance and not in form merely, it is enough to say, that the tally-sheets were perfect and unimpeached.

The remaining assignment is, that the court erred in excluding parol evidence offered by the respondent, to supply defects in the tally-sheet and poll-book of an election held in the 70th regiment, Ohio volunteer infantry. In this case, the tally-sheet and poll-book are both defective. The tally-sheet has the proper recitals in its caption, of the time, place and military organization; and of the names of the judges and clerks; but it is not signed by the judges and clerks. The poll-book is properly signed by the judges and clerks; but it has no recitals in the caption, the blank spaces being unfilled. Each, taken separately, is substantially defective; and yet, both taken together, show all the necessary facts. In order to supply these defects, the respondent offered, in connection with the tally-sheet and poll-book, sundry depositions, taken before justices under the notice, fully authenticating the tally-sheet and poll-book, as the tally-sheet and poll-book of said election, actually kept and made out by the judges and clerks who signed the poll-book, and at the time and place, and in the regiment named in the tally-sheet; and that the voters credited to Brown county thereon, were residents of said county. This evidence, as well as the tally-sheet and poll-book to which it referred, was rejected by the court.

The question presented by this assignment of error is

(Election papers.)

important, and so far as we know, has never been directly before the court. That question is, can the court, in trying a contested election, go behind the poll-books and tally-sheets, to supply and correct mere omissions and mistakes in them, by parol evidence? We have no hesitation, either upon principle or authority, in answering the question in the affirmative. For what other purposes the court can go behind them, it is not for us now to decide; much less is it necessary, in the present case, to undertake to draw the line between what is merely directory and what is vital, in the provisions of law regarding such documents; the question is not best determined in that way; such provisions may be considered directory for one purpose, and vital for another.\* The provision, for instance, that the poll-book shall be signed by the judges and clerks, may be vital, as to the poll-book *per se*, and yet directory as regards the legality of the election itself.

The question to be decided in an election contest is, which party received the greatest number of legal votes? If the court can, as it necessarily must, go behind the abstract, why should it not also go behind the poll-books and tally-sheets? And if it go behind the latter for any purpose, one of the first and most obvious would seem to be, to cure mere mistakes and formal omissions. If you may *impeach* them by parol, why not *sustain* them by parol? We apprehend the true rule to be, that both the abstract and the poll-books and tally-sheets, when substantially correct upon their face, are *primâ facie* sufficient, but may be impeached by evidence *aliunde*, showing their falsity or insufficiency; and that, when not so substantially correct upon their face, they may be sustained in the same way. To hold that when an election has been in fact held, and the majority of the legal voters have in fact, and according to the prescribed forms of law, cast

\* Another illustration of the impropriety of vesting such discretionary powers in an elective judiciary.

(Election papers.)

their ballots for the candidates of their choice, the constitutional rights of the voters and of their candidates, can be defeated by a mere misprision or omission of the judges or clerks, would be manifestly unjust, and contrary to the plain intent and spirit of our election laws. Such a result should be permitted only in cases of necessity, arising from the want of proper means to ascertain, with reliable certainty, the facts of the case; such is not the case here. We have all the facts, and they are not, as the case now stands, disputed; they are contained in the poll-book and tally-sheet, supported by the parol evidence; together, they show an election held according to law, and the precise number of votes actually cast for each candidate. To this evidence, the contestant demurs; we think that such a demurrer, in an election contest, is not well taken.

That in such a contest the court, unlike the canvassers, can go behind the tally-sheets and poll-books, seems well settled in New York, and we are shown no authority to the contrary elsewhere. *People v. Cook*, 8 N. Y. 67; *People v. Van Slyck*, 4 Cow. 297; *People v. Ferguson*, 8 Cow. 102; *People v. Vail*, 20 Wend. 12. In the last-named case, the court, in speaking of the injustice of a contrary holding, said, "it would be nothing less than saying, that the will of the people, plainly expressed in the form prescribed by law, must be utterly defeated, by the negligence, mistakes or fraud of those who are appointed to register the results of an election." And again, "I think we are bound, in this proceeding (a *quo warranto*), to go back to the town canvass, and rectify the errors in the statement of the inspectors." In Ohio, we have but a single *dictum* on the question, and that is in *Ingerson v. Berry*, 14 Ohio St. R. 325, where the judge delivering the opinion, in speaking of the powers of the court, says, "it is clothed with full power to judge of the validity of the returns as shown by the poll-books, and to go behind them and inquire into the legality of every vote which they exhibit."

(Election papers.)

We are satisfied the court erred in rejecting the three perfect tally-sheets and their accompanying defective poll-books; and also in refusing the defective poll-book and tally-sheet, so sustained by parol evidence. Of course, when admitted, they will be subject to impeachment by counter-testimony of the contestant; what would have been the final legitimate result, had they been so admitted, it is not for us to say; it is enough to know, as the record shows, that if not so impeached, or overcome by other evidence, their effect would have been to change the result, and that, therefore, the error was one apparently to the prejudice of the plaintiff in error. The judgment must, therefore, be reversed and the cause remanded for further proceedings.

Judgment reversed.

---

It is well settled, that the election papers, though conclusive upon the return judges or canvassers, may be impeached, on a *quo warranto* or contested election, where the question is, which candidate actually received the greater number of legal votes. *People v. Vail*, 20 Wend. 12; *Commonwealth v. County Commissioners*, 5 Rawle 77. They are to be considered as *prima facie* true and correct, but may be vitiated by faults and irregularities; the design of the law in requiring them to be filed by the officers of the election, is to afford the highest evidence by which the true vote of every elector may be ascertained; but, like all other documentary evidence, they are subject to be impeached by proof *aliunde*. *Mann v. Cassidy*, 1 Brewst. 12, 48. Where the poll-books, tally-sheets and returns substantially comply with the statutes, and all formal mistakes and omissions are supplied by the other evidence in the case, and these, when taken together, clearly tend to show the result of the election, they cannot be properly excluded from the consideration of the court. *Powers v. Reed*, 19 Ohio St. R. 189. Even if it be shown that they were left, for some days, in an exposed condition, and that they have been in some respects altered, they are admissible in evidence, their fairness and alteration being matters for investigation by the court and jury. *State v. Adams*, 2 Stew. 231 (ante 288-9). And unless their loss be proved, or

(Election papers.)

their non-production accounted for, parol evidence of their contents cannot be received. *Olive v. O'Riley*, Minor 410; *Sinks v. Reese*, 19 Ohio St. R. 306. The court, however, on the hearing of a contested election, will not take notice of the papers on file, unless they have been referred and made part of the petition and record in the cause. *Carpenter's Case*, 2 Pars. 537. See *United States v. Souders*, 2 Abbott U. S. Rep. 456.

For the purpose of showing that a person voted, the poll-list is admissible in evidence, though not signed by the inspectors or clerk, having no heading to denote its character, and never having been filed in the clerk's office. *People v. Pease*, 27 N. Y. 45. If the register or poll-list, when produced, contain, upon its face, after the list of names written in ink, other names in pencil, followed by the word "sworn," it is evidence that these latter were not registered voters, but that their names had been added at the polls. *State v. Hilmantel*, 23 Wis. 422. It may be shown by parol, that ballots cast for a person by the initials only of his name, or by an abbreviation of his Christian name, were intended for one of the candidates. *People v. Ferguson*, 8 Cow. 102; *People v. Cook*, 8 N. Y. 67. In Michigan, however, it was held, that a ballot cast for J. A. Dyer could not be counted for James A. Dyer, though the use of a common and well-understood abbreviation would not vitiate the ballot. *People v. Tisdale*, 1 Doug. 59; *People v. Higgins*, 3 Mich. 233; *People v. Cicott*, 16 Mich. 283. (But see ante 258-68.) The ballots themselves are better evidence of the number of votes cast, and for whom cast, than the tally-list made from them by the officers of the election. *People v. Holden*, 28 Cal. 123. The general rule requiring the production of the best evidence of which the case in its nature is susceptible, applies in respect to the contents of poll-books, tally-sheets, and the number and contents of ballots cast at an election, where the production of the same is attainable. *Sinks v. Reese*, 19 Ohio St. R. 306.

## PEOPLE v. PEASE.

In the Court of Appeals of New York.

JUNE TERM 1863.

(REPORTED 27 NEW YORK 45.)

[*Evidence in contested election cases.*]

The question whether a voter was or was not duly qualified, is not concluded by the decision of the inspectors ; it is open to examination, in subsequent proceedings, upon any competent evidence.

It seems, that the declarations of a voter, though hearsay evidence, are competent to prove his want of qualification.

A voter, called as a witness, may be asked for whom he voted, and if he decline or be unable to state, circumstantial evidence may be received to prove the fact ; and he may be asked for whom he intended to vote, as one of the circumstances bearing on the question.

For the purpose of showing that a person voted, the poll-list kept at the election is admissible, though not signed by the inspectors or clerks, having no heading denoting its character, and never having been filed in the town-clerk's office.

Where the evidence is, that one who voted, was alien born, the presumption is, that he voted legally, and was duly naturalized ; *aliter*, if there be *primâ facie* evidence that he had not become a citizen by naturalization or otherwise, in such case, the burden of proving his naturalization is cast on the party desiring to retain the vote.

This was an action in the nature of a *quo warranto*, to try the title to the office of county treasurer of the county of Lewis. The defendant had a verdict and judgment in his favor, which was affirmed at the general term, and from that affirmance the plaintiff appealed. The facts of the case are sufficiently stated in the opinions of the judges.

*Starbuck*, for the appellant.

*Kernan*, for the respondent.

DAVIES, J. The charge of the judge at the trial, and the exception taken by the relator, present the main ques-

(Evidence in contested election cases.)

tion in controversy in this action, and the only one of importance demanding consideration. It is certainly a question far-reaching in the results which must follow its determination, for, upon its just decision, must depend the value and purity of the elective franchise. When we reflect that, under the present constitutional provisions in this state, we not only elect all legislative officers, but most of our judicial, executive and administrative, it cannot fail to be seen, how vital it is to the success and permanence of our institutions, that the voice and will thus expressed be those of the persons constitutionally qualified thus to speak. It is of but little moment that constitutional qualifications, as preliminary to the exercise of the elective franchise, are prescribed, and that those thus entitled exercise that right, inestimable to freemen, if persons having no such qualifications may exercise the same right, and thus thwart and subvert the will of the legal voters. Such, certainly, could never have been the intent of the framers of our system of government; and such results, it has never been heretofore supposed, were to be anticipated from our elective system.

By the fifth section of the first article of the constitution of the United States, each house is declared to be the judge of the election returns and qualifications of its own members. A similar provision, as applicable to our state legislature, is found in the constitution of this state. Art. III., sect. 10. And a like provision in most, if not all, of the charters of the various municipal corporations of this state, will be found, as applicable to the election of the members of the common councils thereof. So far as I have been able to discover, the rule is universal in all legislative bodies, to scrutinize the qualifications of the voters, and to deduct or disallow all votes cast for any candidate by non-qualified voters. This rule seems to be well established in such cases, and it is not perceived, that any substantial reason can be suggested, why a different



(Evidence in contested election cases.)

one should obtain in a civil suit or proceeding to determine the right of an individual to a particular office.

This rule was distinctly recognised and affirmed by the house of representatives, in the election case of *Valandigham v. Campbell*, 41 Cong. Globe 2317. In the extended debate had upon that case, all the members conceded that the votes of illegal or non-qualified electors must be deducted or disallowed; and the main point of difference, in the discussion, was, as to the manner of establishing such disqualification. It was contended by some members, that it could only be shown by the oath of the voter himself, whilst others maintained, that hearsay evidence of such disqualification was admissible. Numerous precedents are cited at page 2320, fully sanctioning the doctrine, that hearsay evidence can be received; at page 2319, a case is cited, where, before the election committee of the house of commons, in England, Mr. Maule objected that the declarations of one John Nowlan were not evidence against the sitting member; Mr. Thesiger (since Lord Chancellor, now Lord Chelmsford), in reply, said: "In the Southampton case, it was held, evidence may be given of the declaration of a person, even after voting, though it may tend to affect him with penal consequences; in the Ripon case, the voter had stated to two persons, in the months of June and July 1832, that he had no vote, and that his aunt was tenant of the house; the election took place in the beginning of 1833, and the declarations were held admissible. A voter who has voted for the sitting member, is always considered as a party, and it is on that ground, that his declarations are admissible; the question is always considered to be between the voter and the party questioning his vote, and not merely between the sitting member and the petitioner." The committee resolved that the evidence should be received.

The constitution of this state declares who may exercise the elective franchise; those entitled to vote at any election are, every male citizen of the age of 21 years, who

(Evidence in contested election cases.)

shall have been a citizen for ten days, and an inhabitant of this state for one year next preceding any election, and for the last four months a resident of the county where he may offer his vote. Art. II., sect. 1. It follows, that none others than those possessing these qualifications can lawfully vote. All votes are to be by ballot, and offered to the inspectors of election, on the day of the election; and it is made, by statute, the duty of each inspector to challenge every person offering to vote, whom he shall know or suspect, not to be duly qualified as an elector. 1 Rev. Stat. 433, § 36. And § 41 (same page), declares that, in case any inspector of election shall knowingly and wilfully permit or suffer any person to vote, at any election, who is not entitled to vote thereat, the said inspector so offending, on conviction, shall be adjudged guilty of a misdemeanor. If a person offering to vote be challenged, it is made the duty of the inspectors, to administer to the voter the preliminary oath prescribed by the statute, and to put such questions to the voter as may tend to show his right to vote; and if any person shall refuse to take such preliminary oath, or to answer fully any questions which shall be put to him, his vote shall be rejected. 1 Rev. Stat. 430, §§ 18–20. If the person offering to vote shall persist in his claim to vote, after the inspectors shall have pointed out to him wherein his right to vote shall appear to them deficient, the inspectors shall then, if the challenge be not withdrawn, administer the general oath set forth in the statute; if the oath is refused to be taken, the vote is to be rejected. Ibid. 430, 431, §§ 21, 22, 24.

It is seen, therefore, that the inspectors have no authority, by statute, to reject a vote, except in these three cases: after refusal to take the preliminary oath; or fully to answer any questions put; or on refusal to take the general oath. And the only judicial discretion vested in them is, to determine whether any question put to the persons offering to vote, has or has not been fully answered. If the questions put have been fully answered, and such

(Evidence in contested election cases.)

answers discover the fact, that the person offering to vote is not a qualified voter, yet, if he persist in his claim to vote, it is imperative upon the inspectors to administer to him the general oath, and if taken, to receive the vote and deposit the same in the ballot-box. These are all the safeguards the legislature have thought proper to provide, to ensure the prevention of fraudulent or illegal voting; and this leaves but little discretion to the inspectors; their duties, except in the single instance adverted to, are simply ministerial in the reception of the votes, and entirely so, in counting and making returns thereof. The legislature have left to those bodies having the power to judge of the return and election of their own members, to correct any abuses which may have resulted in such election; and to judicial investigation, where the legal rights of individuals are concerned or affected, to apply such remedies as the nature of the case calls for.

An action is prescribed by law, in the nature of a *quo warranto*, to determine, as well the question of usurpation of the person in office, as the claim of the person asserting his right thereto; in this action, the determination disposes as well of the public interest as of the private right. It is not of so much importance, so far as the public is concerned, which of two claimants shall discharge the duties of an office; but the private right of an individual to the fees and emoluments of an office, is properly and legitimately the subject of judicial cognisance, and to adjudicate upon this right, it becomes essential to determine who was legally and duly elected or appointed to it, and who is entitled to discharge its duties, and receive and enjoy its fees and emoluments. The provisions of the Code, in reference to this action, are ample to cover and secure, as well the interests of the public, as the private rights of the parties; the determination of those rights necessarily leads to an investigation into the title of the claimant to the particular office, and such investigation

(Evidence in contested election cases.)

must result in a determination of the legality of the election or appointment of the one or the other.

It is made the duty of the board of county-canvassers, upon the statement of votes given, to determine what person, by the greatest number of votes, has been duly elected to any office mentioned in said statement. 1 Rev. Stat. 438, § 10. County treasurers of the several counties of this state are to be elected at a general election, and hold their office for three years. Ibid. 406, § 17. And the certificate of the board of canvassers authorized to canvass the votes given for any elective office, is made evidence of the election of the person therein declared to have been elected. Ibid. 410, § 22. But such certificate is only *primâ facie* evidence of the title of the person receiving it, to the office therein mentioned; in all cases where the proceeding is by *quo warranto*, or in an action of that nature, it is held, that such proceeding is instituted to try the right to the office directly, and it is competent to go behind the certificate, which would otherwise be conclusive, to ascertain the real facts of the case. *People v. Seaman*, 5 Denio 409; *People v. Ferguson*, 8 Cow. 102; *People v. Van Slyck*, 4 Cow. 297; *People v. Vail*, 20 Wend. 12. In this last case, Bronson, J., says, "such proceeding reaches beyond those evidences of title which are conclusive for any other purpose, and inquires into and ascertains the abstract question of right:" he also says, "in those legislative bodies which have the power to judge of their own members, it is the settled practice, when the right of the sitting member is called in question, to look beyond the certificate of the returning officer; and I think a court and jury, with better means of arriving at truth, may pursue the same course."

But while it is conceded, that this proceeding is to ascertain the very right of the person to the particular office, and that, by means of it, any negligence, mistake or fraud of the inspectors or canvassers in their proceedings may be corrected, yet, it is contended, if the inspec-

(Evidence in contested election cases.)

tors have received and allowed votes to a party, given by persons not qualified to vote, such proceeding is final and conclusive, and the party thereby defrauded of an office to which he was duly elected, by having received the greatest number of legal and qualified votes, has no remedy, but must submit, as well to the loss of the office as of the fees and emoluments growing out of it. I cannot assent to such a proposition. What is it that confers title to the office, and the legal right to the reception of its emoluments? It surely is the fact, that the greatest number of qualified voters have so declared their wishes, at an election held pursuant to law. It is not the canvass or estimate or certificate which determines the right; these are only evidences of the right, but the truth may be inquired into and the very right ascertained. When it is so ascertained, the legal consequences follow, that the person usurping the office is ousted, the person legally entitled takes the office and its fees, &c., and recovers from the usurper the fees or emoluments belonging to the office, received by him, by means of his usurpation thereof. If the term of the office should have expired before the final determination of the question, it follows, that the successful party cannot take the office, but he will be none the less entitled to recover the fees and emoluments to which he was legally entitled, which may have been received by the usurping claimant.

Now, can a person be deprived of the fees, &c., by the votes of persons not qualified to cast them? It would seem, that the statement of the proposition furnishes its own answer. The constitution prescribes who may vote, and it is needless to say, that none others can lawfully do so; but if, through inadvertence, fraud or mistake, the votes of persons having no right so to vote are taken and counted for a particular candidate, and he is thereupon, by reason of counting and allowing such votes to him, declared duly elected to a given office, and enters upon the discharge of its duties, and receives the fees and

(Evidence in contested election cases.)

emoluments pertaining thereto, can he interpose such illegal votes to the claim of the person rightfully elected by the greatest number of legal and qualified voters? Can he make title to the office, by the votes of those who have no legal or constitutional right to vote, in other words, by the wishes of those not voters? In my opinion, clearly not; the very right to the office is determined by the fact, to whom was the greatest number of legal and duly qualified votes given? Or suppose, that instead of the voting having been by ballot, it had been *vivâ voce*, and the relator in the present case had 1702 persons declaring for him, for county treasurer, and the defendant 1698, and of those declaring for the relator, it conclusively appeared on the trial, that ten, fifteen or twenty of those thus declaring for him were women, minors or aliens, and thus not voters, and that all those declaring for the defendant possessed the legal qualifications of voters, could there be a moment's doubt as to which was legally entitled to the office? I do not see that there could; and the supposed case is, in substance, that now under consideration. How can those who have no legal right to interfere with, or be heard at an election, deprive the legal and qualified voters of their legitimate choice, or the person duly elected by them to an office, of its emoluments and advantages? A vote is but the expression of the will of a voter; and whether the *formula* to give expression to such will, be a ballot or *vivâ voce*, the result is the same; either is a vote.

It is a paradox to say, that a vote can be given by one not a voter, and as it is the greatest number of votes which elects a candidate and gives title to the office, it follows logically, that those ballots given or handed in by persons not voters, are not votes, and cannot, therefore, be rightfully estimated, or have any influence upon the result. Ordinarily, there would be great difficulty in separating or ascertaining which ballots were legal, and which have no validity whatever, as being given by non-voters; but in the case at bar, it is clearly ascertained, that five ballots

(Evidence in contested election cases.)

or votes, given and counted for the relator, were cast or given by persons not qualified to vote, and he, consequently, in truth and in fact, had five votes less than have been counted and allowed to him. They must, therefore, be subtracted from the total vote allowed to him; and such subtraction leaves him a less number of votes than were given for the defendant. In the case of *People v. Van Slyck*, 4 Cow. 297, Jones, J., *arguendo*, says, "to make a choice of the defendant, within the provisions of the statute, there should be a majority of legal votes;" and such seems evidently to be the view of the court. It hardly needs argument or illustration, to show that the votes contemplated by the framers of the constitution, and by the legislature, in declaring the person having the highest number of votes should be elected, and entitled to the particular office, meant thereby legal votes—those, and those only, cast by voters possessing the constitutional qualifications.

In my opinion, ballots cast by females, minors, aliens or those not having the constitutional qualifications, are not votes, within the meaning of our constitution and election laws. Cole on Quo Warranto 110 (citing a number of English cases), lays down these propositions, which harmonize with the views already suggested: he says, that the party may not have been duly elected; this may happen, although he was qualified to be elected, and the election itself was neither void nor irregular, as, when he did not obtain a majority of legal votes. The burgess-roll is *prima facie* evidence of a party's right to vote as a burgess, at an election; indeed, no question can be put to him as to his right to vote, but only to his signature to the voting-paper delivered in by him, and his identity with the person named in the burgess-roll, and whether he has already voted at that election; but the burgess-roll is not conclusive as to the voter's title, upon an application for a *quo warranto* information against the party elected, and therefore, the relator may show, by affidavit, that although the defendant had a colorable majority at the election, yet, that

(Evidence in contested election cases.)

certain of his votes were bad ones, for specified reasons, and that, deducting such bad votes, the relator or some other candidate had the majority of legal votes. So, it may be shown, that some of the voting-papers for the defendant were defective and insufficient, and that, deducting them, the defendant had not a majority of legal votes.

The same doctrine was enunciated in the case of *Rex v. Vice-Chancellor of Cambridge*, 3 Burr. 1647, where a *mandamus* was awarded to put the Earl of Hardwicke into the office of High Steward of the University of Cambridge, on the ground that one of the votes given against him, which produced a tie, was an illegal vote, cast by a person not having the right to vote; the proctors had declared the vote to be equal, and therefore, no election. Lord Mansfield, after discussing the qualifications of Mr. Pitt, whose vote had been given against the Earl of Hardwicke, and thereby produced a tie, arrived at the conclusion that he was not a legal voter; and if so, he says, there is a majority of one for Lord Hardwicke, unless the other side can disqualify some of those who voted for him; he further says, "the declaration of the proctors cannot affect the substantial right; the right of election appears to be in Lord Hardwicke, and I am very clear, that the foundation of the rule should be the election." Justice Wilmot said, "as to the declaration of the proctors—I think it immaterial, for the question depends, not upon that, but upon the real majority of legal votes; this declaration cannot alter or affect that; if they had made a declaration, and even if such their declaration had been contrary to the truth and real right, the court must have taken up the matter upon the true and real merits, for the right to the office attached in Lord Hardwicke, upon his having a majority of legal votes." "If he had a real right, this court ought to give activity to it, and the omission of a declaration of the proctors, or the falsity of it, cannot affect their judgment concerning the legality of the right." "Therefore," he adds, "Lord Hardwicke had the majority of legal votes."



(Evidence in contested election cases.)

We have seen, from the authorities and cases cited, that the practice is universal, when a scrutiny is instituted to determine the right to an office, by legislative bodies, to reject all votes given or cast by persons not duly qualified to vote; and upon such investigation, the declarations of the person casting the vote have been admitted and received as evidence of his qualification or want of qualification. It is hearsay evidence, and yet, upon well-settled and uniform practice, has been allowed. The learned note to 3 McCord 230, on hearsay evidence, distinctly announces this doctrine; he says, under the 23d head, the declarations of a voter may be given in evidence to set aside the election, as to diminish the poll, by taking an incompetent vote off, or to prove bribery, &c., but they are not admissible on a charge against the candidate for bribery, &c.; they are admitted to annul votes, but not to set aside the election by disqualifying the member on account of bribery, &c.; citing the Case of Milborne Port, 1 Dougl. Elect. Cas. 67; Case of Joel Chester, 1 Ibid. 76; Petersfield Case, 3 Ibid. 6; Worcester Case, 3 Ibid. 129; Shaftsbury Case, 3 Ibid. 150. The doctrine is referred to with approbation in 2 Cow. & Hill's Notes 322, and the learned note in 3 McCord is referred to as the source from which the editor has obtained the remarks and references quoted by him. These writers, and the cases cited by them, distinctly recognise the doctrine, that upon a scrutiny had in reference to the validity of an election, the votes given by unqualified voters may be deducted to diminish the poll, by being taken off as incompetent, and the votes so given may be annulled, or disregarded or rejected. In the case at bar, the disqualification was proved by the voter himself; but these authorities abundantly sustain the position, that the declaration of the voter, as to his want of qualification, would have been admissible and legal evidence.

It is urged, however, that the act of the inspectors, in receiving and depositing the ballots, is judicial, and there-

(Evidence in contested election cases.)

fore, cannot be reviewed in this action. It is supposed, that the contrary has been satisfactorily shown, and that the universal practice of the courts in actions or proceedings like the present, where they have inquired into the very right of the case, refutes this assumption. In the case of *People v. Van Slyck*, 4 Cow. 297, it was urged by the counsel for the defendant, that the certificate of the determination of the board of canvassers was conclusive evidence of the election; that it could neither be impeached nor contradicted; that the authority exercised by the board of canvassers was judicial; and that if the supreme court had jurisdiction to review the determination of the board of canvassers, their reviewing power could only be exercised through the medium of a *certiorari*, and until reversed in that form, it remained valid and conclusive, and could not be questioned by an information in the nature of a *quo warranto*. These views were repudiated by the court, in that case, which held, that the act of the canvassers was not judicial, but merely ministerial, and that the trial in *quo warranto*, is had upon the right of the party holding the office. This doctrine was promulgated nearly forty years ago, in this state, and has, so far as I can ascertain, been acquiesced in and sustained in all cases, and I think it ought not now to be disturbed. In *People v. Ferguson*, 8 Cow. 102, it was urged, that the court could not go behind the ballot-boxes; that such a principle would be of the most dangerous tendency: Chief Justice Savage most correctly said, that the object of an election is, that the person receiving the greatest number of votes in his favor, shall have the office designated by the electors; that he could not assent to the proposition, that you may not look beyond the ballot-boxes for testimony, because of the danger of perjury and subornation of perjury; he considered the question fairly before a jury, and to be proved, like all other facts, by the best evidence that the nature of the case admits of.

We were much pressed with the argument, that it would

(Evidence in contested election cases.)

be attended with great inconvenience, if we permitted a party to try his right to an office, by showing that his adversary received a greater number of illegal votes than the ascertained majority given him. It was said, that in a general state election, the time necessarily occupied in such a trial might consume more than eighty-three years. It is the first time I have ever heard it urged, that a party who had a conceded right should not have a remedy to enforce it, because a large consumption of time would take place before his right could be established; if a party has a legal title to an office, it surely can be no legal reason for denying him the opportunity to establish it, that such process will require the examination of a large number of witnesses, and consume much time in the proceeding; rights of parties cannot be determined on such a basis. The case of *Rex v. Cambridge* only required the examination into the qualification of one voter, and it was entertained by the court of King's Bench, but not for that reason; *Ex parte Murphy*, 7 Cow. 153, involved an inquiry as to two illegal votes, and it clearly would have been entertained, if they had influenced the result of the election. The case of *People v. Cook*, 14 Barb. 259, s. c. 8 N. Y. 57, involved an inquiry into the title of the contestant to the office of state treasurer, and who had been voted for at a general state election; I do not find it was urged in that case, that the action ought not to be entertained, on the ground of inconvenience, or the great length of time which was occupied in the investigation.

The views expressed by Judge Willard, in this court, in the case of *People v. Cook*, are sound and should be adhered to; he says, "we are not called upon to say that every possible question under the election law may be corrected in this way; it is enough, that the principle contained in *People v. Ferguson* sustains the ruling of the court below; that case has stood the scrutiny of more than a quarter of a century, and has neither been disturbed by the new constitution, nor the repeated revision of the

(Evidence in contested election cases.)

election law; I see nothing in the present case that requires us to depart from it:" he adds (and what he says is as applicable to the present case as to the one then under consideration), "nor is there any danger to be apprehended to the security of our institutions by pursuing this practice; the right to an office is no higher than a right to life, liberty or property; there is no principle that should withdraw the first from the cognisance of a court and jury, to the exclusion of the last; both will, indeed, be safe under the administration of the ordinary tribunals." We think, therefore, the charge of the judge at the circuit, that it was to be determined upon the evidence adduced, which candidate had the most lawful votes, and if they found that the defendant had the greatest number of legal votes, then he was entitled to the office, and their verdict should be in his favor, was correct, and that the verdict, on that ground, should not be disturbed.

The motion to strike out the testimony of Conrad Hoch was properly denied; it was for the jury to say, from the whole testimony, whether, in fact, his vote had been given for the relator; he stated unequivocally, that he voted for Smith, and on cross-examination, he testified, that it was said Smith's name was on the ticket; that was all he knew about it. It was for the jury to say, from all the circumstances related by him, whether or not he voted for the relator; we are to assume, that they believed he did. The objections taken to the refusal to strike out the testimony of Shoat cannot, we think, be sustained; the witness had testified that he did not know whether he voted or not for Smith, and the other matters stated by him may be regarded as wholly immaterial. The other exceptions do not seem to call for any further observation.

It seems to us, that the judge was correct in stating to the jury, that when it was proved that a man was alien born, and there was *primâ facie* proof that he had never been naturalized, or otherwise become a citizen, the vote

(Evidence in contested election cases.)

given by him must be stricken out; and the burden of proving citizenship, was either upon the voter, or the party claiming his vote to be legal; if the views herein expressed are sound, then this charge was unexceptionable. So was that part of the charge correct in relation to the witness Rivinot, who testified, that he was born in France and had voted, and there was no evidence tending to show that he had ever been naturalized; the judge in that case charged, that the legal presumption was, that he had been naturalized. No suggestion was made or evidence given, when the witness was on the stand, that he had not been naturalized; he had voted, and the presumption was, that he had voted legally; it was not for the court to say, as matter of law, that the vote was illegal; in this state of facts, the presumption was, that he was a legal voter, not that he had committed a crime. On the same ground, the court might have been asked, if he had stated he was native-born, that his vote be excluded, because it was not proved that he had attained the age of twenty-one years; the legal presumption would be, that he had legally exercised the privilege of voting, until some facts appeared which would raise a contrary presumption. The judgment appealed from should be affirmed with costs.

SELDEN, J. This action, like the action of *quo warranto*, and the proceeding by information in the nature of *quo warranto*, where the defendant is in the exercise of the duties of an office, involves the question of his right to exercise those duties, and the burden of proof rests upon him to establish his right; "the trial is had upon the right of the party holding the office." 4 Cow. 323; Cole on Quo Warranto 221. Where, as in the present case, the relator is a claimant of the office, the trial also involves his right as well as the right of the defendant. Code of Procedure, § 436; 12 N. Y. 433; 16 Barb. 373.

It appears to have been assumed, at the commencement of the trial in this case, that the defendant (Diodate Pease)

(Evidence in contested election cases.)

had a *prima facie* title to the office, and the plaintiffs took the initiative to disprove his right and establish that of the relator (Moses M. Smith). The evidence produced by the plaintiffs was unquestionably sufficient, in the absence of further proof, for that purpose; according to well-settled rules, the board of canvassers erred in refusing to allow to the relator the 19 votes given for Moses Smith and M. M. Smith, the addition of which to his unquestioned vote, would have given him four majority over the defendant, after adding to his vote the three votes given for D. Pease, and one for Deodate Beas; and five majority, if the last-mentioned vote were not counted for the defendant, about the propriety of which there might be some question. 8 Cow. 102; 5 Denio 409. This state of facts must be decisive in favor of the plaintiff, if the position taken in his behalf be sound, that it is not competent for the court, in trials upon *quo warranto*, to go behind the ballot-box, and inquire into the qualifications of the voters whose ballots have been received.

The first ground upon which this position is attempted to be sustained is, that inspectors of elections are judicial officers, whose decisions, in receiving the ballots of voters, are final and conclusive. So far as the subject has been touched upon by previous decisions, there is found little or nothing to sustain this position, and I am satisfied that it cannot be sustained. In the celebrated case, in England, of *Ashby v. White* (2 Ld. Raym. 938; 1 Bro. P. C. 45), as finally decided by the House of Lords, officers having the power of our inspectors of election and boards of canvassers combined, were held to act ministerially, and not judicially, in holding elections and making return of the votes. In Buller's N. P. 64, it is said, that an action on the case lies "for a wilful misbehavior in a ministerial office by which the party is damnified, as denying a poll to one who stands candidate for an elective office (such as bridge-master), and it need not be averred in the declaration, that he would have been chosen if the poll had been taken; so for

(Evidence in contested election cases.)

refusing to take his vote at an election; so, for not returning him who is duly chosen;" referring to 1 Vent. 55; 2 Lev. 55. In *Jenkins v. Waldron*, 11 Johns. 114 (ante 190), the principle is recognised, that inspectors of election, in this state, are ministerial officers; the action against the inspectors in that case failed, not because the defendants were held to be judicial officers, but because it was not shown that they acted with malice; if they had acted as judicial officers, no civil action would have lain against them, even if charged with malice. 12 Co. 24; 1 Salk. 396-7. In the case of *People v. Turnpike Co.*, 23 Wend. 228, Cowen, J., says, "the office of inspectors is merely ministerial; on a given concurrence of circumstances, well defined by constitution or statute, they are bound to receive or count votes and give certificates of election; they have no more discretion than a sheriff in disposing of real estate upon execution." *Ex parte Heath*, 3 Hill 47; *People v. Seaman*, 5 Denio 411.

The position that inspectors of election are judicial officers would prove too much for the plaintiff's case. If they act judicially in receiving votes, they also act judicially in counting them, and declaring and certifying the result; if their act be conclusive in the one case, it is conclusive in the other, and the plaintiff must rest contented with their reports which, combined, gave the greatest number of votes to the defendant. Inspectors are required to decide some questions, but they are such as ministerial officers are often required to decide; a county-clerk, before recording a deed, must decide whether it is legally proved or acknowledged, but his decision is not conclusive; a sheriff must decide whether the one whom he arrests is the person described in his process, but his decision is not judicial, and he acts at his peril. 6 Cow. 456. Under § 20 (1 Rev. Stat. 430), inspectors may be required to decide whether the person offering his vote has or has not refused to answer fully all the questions put to him, before they can reject his vote on the ground of such refusal;

(Evidence in contested election cases.)

under § 23, they must decide whether the voter is "a colored man" or not, before they determine what oath shall be administered to him; under § 28, they must decide upon the sufficiency of the record of conviction, before rejecting the vote of one challenged on the ground of his conviction of a crime, and if a pardon be produced, must pass upon the genuineness and sufficiency of the pardon; and under §§ 2 and 40, they may be required to decide what constitutes a bet or wager on the result of the election, before receiving or rejecting the vote of one challenged under those sections.

In these cases, the inspectors may be required to decide important questions, and their decisions, for the purpose for which they are made, that of determining whether the votes shall be received or rejected, are final; but I do not think they are conclusive with regard to the legality of the votes, when the question is presented in an action properly instituted to try the right of a person elected to office, or defeated by the result of their decisions. They cannot call witnesses, they can receive no oral testimony, and no documentary evidence, unless the challenge is based on an alleged conviction of crime; the necessities of the occasion absolutely preclude any more thorough investigation, and demand an immediate and irrevocable decision; for this the law provides. In one respect the decision is final and conclusive, and that is, that the vote shall be received or rejected; but if my view of the intention of the statutes be correct, it leaves the question open for more deliberate adjudication, whether the voter had or had not a right to vote. Great interests often depend upon these questions; they lie at the foundation of the government, and it is of the utmost importance that the means of detecting and exposing fraud and imposition, and correcting error, should be such as to secure the confidence of the people in the ultimate result of elections.

If, however, it be conceded that, in those special cases where express authority is given to the inspectors to receive



(Evidence in contested election cases.)

or reject votes, they act judicially, it does not follow that their judicial power extends to other cases. It certainly does not, if they have committed to them no discretion in regard to the reception of other votes. In my opinion, they have no such discretion; with the exception of the cases to which reference has been made (*viz*: where the person offering his vote refuses to take the preliminary or appropriate final oath; or refuses to answer fully all the questions put to him by the inspectors; or has been convicted of bribery or any infamous crime; or has made, or is interested in, a bet or wager on the result of the election), there is no express authority given to the inspectors to reject any vote, and I regard it as entirely clear, that they have no such authority. The express authority given in these special cases would seem to exclude the idea of a general implied authority embracing all cases.

The course required by the statute to be pursued where the right of any person to vote is challenged, cannot be reconciled with any discretionary power of rejection vested in the inspectors. 1 Rev. Stat. 430, §§ 18-24. The inspectors are, first, to administer what is called the "preliminary oath," requiring the person offering the vote to answer such questions as shall be put to him touching his place of residence and qualifications as an elector; the statute then mentions several questions which are to be addressed to him by the inspectors, and authorizes such other questions as may tend to test his qualifications as a voter; if he refuse to take the oath, or to answer fully, his vote is to be rejected; but if he answer fully, the inspectors are required to point out to him the qualifications, if any, in which he shall appear to them deficient; if he still persist in his right to vote, and the challenge be not withdrawn, the inspectors are required to administer to him the general oath, in which he states in detail, and swears that he possesses all the qualifications which the constitution and laws require the voter to possess; if he refuse to take the oath, his vote is to be rejected. Is

(Evidence in contested election cases.)

not the inference irresistible, that if he take the oath, his vote shall be received? If his vote is to be rejected after he takes the oath, why not reject it before? As I construe the statutes, the inspectors have no discretion left to them in such a case (where the person offering the vote is not shown by a record to have been convicted of crime, or, by his own oath, to be interested in a bet upon the election), but must deposit the ballot in the box, whatever they may believe or know of the want of qualifications of the voter. They are required to act upon the evidence which the statute prescribes, and have no judicial power to pass upon the question of its truth or falsehood; nor can they act upon their own opinion or knowledge. Another section of the statute strongly confirms this conclusion; that section provides as follows: § 36. "It shall be the duty of each inspector to challenge every person offering to vote whom he shall know or suspect not to be duly qualified as an elector." It is evident, from this section, that the inspector has no power to reject the vote, even when he knows the person offering it not to be a voter; his duty is discharged by requiring the voter to submit to the examination, and to take the oath which the statute prescribes.

In the next place, it is insisted, without reference to the decision of the inspectors, that the only examination of the qualifications of the voter which is permitted, is that which is or may be made before his ballot is received. An argument of some force in favor of this position, is derived from the fact, that it does not appear that the courts of this state, upon the trial of actions like the present, have ever entered upon the investigation of the qualification of voters. This argument is substantially balanced by the absence of any refusal of the courts to do so, unless in a single case at circuit which has not been reported. The absence of precedents in favor of the action against returning officers, was strongly urged in the case of *Ashby v. White*, especially upon the argument in the

(Evidence in contested election cases.)

House of Lords, but it did not prevail, and I do not think the kindred argument is entitled to much consideration in this case.

The judgment, in cases of this kind, is required to be rendered "upon the right of the defendant, and also upon the rights of the party alleged to be entitled" to the office. Code, § 436. As was said by Bronson, J., in the case of *People v. Vail*, 20 Wend. 16, the action "reaches beyond those evidences of title which are conclusive for every other purpose, and *inquires into and ascertains the abstract question of right.*" The greatest number of votes alone gives the right to an elective office in this state; and as no adjudication can be had to determine the lawfulness of votes, before they are received, that question must be open to examination by courts afterwards, or there is no power anywhere in the government to discriminate between those which are lawful and those which are unlawful; indeed, if the rule contended for by the plaintiff be adopted, the distinction between lawful and unlawful votes ceases to exist when they reach the ballot-box. This objection is not answered, by referring to the statutes requiring evidence of the right of the voter, before his vote can be received; it is only when the right to vote is challenged, that any evidence is required, and there is room for great frauds to be practised, as well to prevent challenges, as to render them ineffectual when made; the only evidence required, in any case, is the oath of the person offering his vote, nor is there any power (if the courts do not possess it) to deny to such oath the effect of honest and truthful testimony, although every one who hears it may know it to be false and fraudulent. Neither is it an answer to say, that the offender may be punished, as the government, if that were the only remedy, would have no means of defence against the direct results of such a fraud; I am unwilling to believe that, in a matter of such vital importance as the choice of all its elective officers, the state is thus exposed to assault.

(Evidence in contested election cases.)

The registry act was not in existence when the election now in question took place; but if it had been, it would not have changed the aspect of the present question. Its only effect in this respect is, to require from the voter two oaths instead of one, making the oath equally conclusive in each case. Laws 1859, ch. 380, § 5. It furnishes additional safeguards against the commission of frauds at elections, and may aid in securing the punishment of offenders, but it furnishes no means of protecting the government against the consequences of such frauds, and therefore, leaves the present question precisely where it stood before.

In England, on trials of this nature, the legality of the votes is always open to inquiry, as it certainly is, in this country, in suits involving the election of officers of private corporations. *Cole on Quo Warranto* 146-221; *Ang. & Ames on Corp.*, ch. 4., § 9; 7 *Cow.* 153; 19 *Wend.* 635. The comparatively narrow limits within which the right of suffrage is confined in England, deprives the decisions of courts in that country, upon this question, of much of the influence which would be justly due to them upon other questions; and the decisions in corporation cases are still less directly applicable to that under consideration. Those cases, however, show that where the right to an office is in controversy, it is not, as a general rule, conclusively determined by the number of votes which the claimant may have received, but the further question whether the votes were legal, is open for consideration. Without deciding that question when it is presented, judgment cannot be rendered "upon the right" of the parties, as the statute requires. Code § 436. In contests in regard to elections to congress, the legality of the votes, as well as their number, has always been a subject of inquiry. *Cushing Lex Parl. Am.* § 198. And "I think a court and jury, with better means of arriving at truth, may pursue the same course." 20 *Wend.* 14.

The inconvenience which, it is supposed, may arise on

(Evidence in contested election cases.)

the trial of such questions, from the great number of witnesses which may be required, especially in trials relating to state officers, has been relied on as a reason why it should not be held, that courts can pass behind the ballot-boxes, and try and determine the qualifications of the voters whose votes may have been received or rejected. This argument is certainly not without force, as cases may readily be imagined, where anything entitled to the name of a trial of the legitimate issues which such an action might present, would be literally impossible; but believing, as I do, that the statutes have unquestionably left this duty to the courts, no inconvenience which could be anticipated, would justify courts in declining to discharge that duty, as far as possible. The past experience of the government has not been such as to induce the court to pay much heed to this argument from inconvenience; so far as the books of reports show, there has been no case in the state, prior to this, where any such question has been presented, and this does not appear to have involved such a number of issues, or required the examination of such a number of witnesses, as to render the prospect of such trials alarming. But if this were otherwise, the remedy would belong to the legislature, and not to the courts. A rule of pleading requiring the parties to specify the votes objected to, and the grounds of objection, or a rule of practice requiring an exchange of notices to the same effect, and the limitation of the parties, in their proof, to the cases and grounds so specified (as is the practice in England, in regard to contested parliamentary elections), would go far to remove the difficulty, if it should be found to exist. *Roe on Elections*, part 3, ch. 4. A similar practice is adopted when elections to congress are contested. 9 Stat. 568, § 1 (1 Bright. Dig. 254, § 14, and note *a*). My conclusion, therefore, is, that the judge decided correctly at the trial, that evidence was admissible to show that votes received and counted for either of the parties, were given by persons who were not qualified electors.

(Evidence in contested election cases.)

There was no error in the ruling of the judge, that voters might be asked the question, for whom they voted. The only grounds of the objection appear to have been, that under our system of elections, which allows, indeed requires, the secret ballot (1 Rev. Stat. 426, § 17), it is not proper to compel a voter to disclose for whom he voted; and that where the object is, to show that he voted illegally, and was, therefore, possibly, guilty of a misdemeanor, he should not be required to give evidence tending to establish his guilt. It is a sufficient answer to these objections, that they are available only to the witness, and not to the party; in regard to the last ground, there is the further answer (the witness having admitted that he voted), that an answer to the question, for whom he voted, could have no bearing upon his guilt or innocence. The objections to the order in which the proof of the facts should be introduced, involved the exercise of discretion merely, on the part of the judge, which is not, in such cases, reviewable on appeal.

When a voter refuses to disclose, or fails to remember, for whom he voted, I think it is competent to resort to circumstantial evidence, to raise a presumption in regard to that fact; such is the established rule, in election cases before legislative committees, which assume to be governed by the legal rules of evidence. Cushing Lex Parl. Am. §§ 199, 210. And within that rule, it was proper, in connection with the other circumstances stated by the witness, Loftis, to ask him for whom he intended to vote; not, however, on the ground that his intention, as an independent fact, could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote. The refusal to strike out the testimony of Conrad Hoch involved the same principle.

The poll-lists of New Bremen and Croghan were rightfully admitted; the only fact in regard to them which was requisite to be established to authorize their admission as evidence, appears to have been undisputed, viz:

(Evidence in contested election cases.)

that they were the poll-lists of these towns or districts, kept at the election in question. The provisions of the statute relative to such lists must be regarded, mainly, as directory only (14 Barb. 290-1; 8 N. Y. 89); and any failure to comply with such provisions, if lists were actually kept, would not justify their rejection, when offered in evidence. There does not appear, however, to have been any material departure from the directions of the statute, in keeping the lists; neither a heading to show what the paper was, nor the signatures of the inspectors or clerks, was required. 1 Rev. Stat. 432, § 34; 436, § 57. The anterior filing of one of the lists was of no moment, so long as its genuineness was unquestioned. What the lists proved or failed to prove, could not be considered in deciding the question of their admissibility.

There was sufficient evidence offered by the defendant, to justify the refusal of the ruling asked for by the plaintiff's counsel, "that no proof had been given to go to the jury, sufficient to overcome the five majority conceded to the relator," of the votes given. The judge could not be understood as ruling, that the proof was sufficient to overcome the majority, but only that it was sufficient to be submitted to the jury for their consideration as to its effect.

The refusal to allow the examination of the witness, McRea, in reply to the defendant's proof, under the circumstances disclosed in the case, presented only an exercise of discretion on the part of the judge, which ought not to be reviewed here. If there had been no arrangement made on the subject, at the close of the plaintiff's opening testimony, the evidence would have been admissible in reply, as a matter of right, and its rejection would have furnished good ground for a new trial; but the express reservation, with the approbation of the court, of the right to call (at the close of the defendant's testimony, as I understand the arrangement) certain witnesses, who were named, "for the purpose of showing that illegal

(Evidence in contested election cases.)

votes had been cast at said election for the defendant," might properly be regarded as restricting the plaintiff to those witnesses only, in reply, on that subject, although the facts offered to be proved would have been proper in reply, and might have been proved by any witnesses, if no arrangement had been made. It is apparent, that the course attempted to be pursued by the plaintiff might, if allowed, have operated as a surprise upon the defendant. The judge, in whose presence the arrangement was made, was much better qualified to decide, whether it was likely to do so, than this court can be. The arrangement had the effect to change, what otherwise would have been a question of right, into one of discretion.

The first two exceptions to the charge present only the question, already considered, whether the qualifications of the voters could be inquired into on the trial, and therefore, require no further notice. The charge in relation to the change of residence of Bellinger, was too clearly correct to require comment.\* 4 Cow. 516, note 2; Westlake on Private International Law 36. No doubt can arise in regard to the correctness of the charge, that where it was proved that a voter was alien-born, and there was *prima facie* evidence that he had not become a citizen by naturalization or otherwise, the vote given by him must be rejected, unless proof of his citizenship were produced.

The refusal to charge, in the case of Rivinot, that if the jury found that he was an alien born, then, in the absence of any proof of naturalization, his vote must be disallowed; and the charge that, in such case, the legal presumption was, that he had been naturalized, presents a question of greater difficulty. As a general rule, affirmative facts are not to be presumed, but must be proved by

\* The charge in relation to Bellinger's vote was: that if he got married and went to live with his wife in another county, with intent to make that county his residence, that fact constituted a change of residence.



(Evidence in contested election cases.)

the party asserting them; there are, however, some exceptions to this rule, and the question presented by this part of the charge is, whether the case falls within any of those exceptions. I am of opinion that it does, and that the charge was correct. Greenleaf, in his work on Evidence, says, "where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, or *fraud*, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for, in these cases, the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged." 1 Greenl. Evid. § 80. The request to charge in this case involved, on the part of Rivinot, something more than a criminal neglect of duty or fraud; if he voted without naturalization, the act constituted a misdemeanor. 1 Rev. Stat. 449, § 13. The presumption against positive crime, cannot be less strong, than the presumption against fraud or criminal neglect of duty; the negative, therefore, which was involved in the plaintiff's request, could not be presumed, but required to be proved by the party alleging it. *Williams v. East India Co.*, 3 East 192, 199; *Rex v. Hawkins*, 10 East 216; *Powell v. Milbank*, 2 W. Bl. 851.

I can perceive no difference between the present case and one where the right to vote depends on residence. In the case of *Commonwealth v. Bradford*, 9 Met. 268, the defendant was indicted and convicted for voting at the general election in Boston, on the 11th of November 1844, when, as was alleged, he was not a qualified voter, not having resided in Boston the six months next preceding that election. It was proved, that the defendant resided at Kingston, until about the 1st of April 1844, when he went to Boston and entered into partnership there, with the express understanding that he should make that place his residence; that he continued in Boston until the election, with occasional returns to Kingston,

(Evidence in contested election cases.)

where his family remained until a short time before the election, when they removed to Boston; there was conflicting evidence as to his declarations and intentions respecting his domicile. The judge, at the trial, charged the jury that, as "the defendant's domicile was at Kingston, until he acquired one in the city of Boston, the burden of proof was upon him, to satisfy the jury, affirmatively, and beyond a reasonable doubt, that on the 11th day of May 1844, he had changed his domicile from Kingston to Boston, and then dwelt and had his home in that city." Chief Justice Shaw, in delivering the opinion of the supreme court upon this point, said, "the court are of opinion, that this direction was wrong, and that the burden of proof was still on the government, to prove that the defendant had no right to vote, and that he had not been an inhabitant of the city six months; this, it is true, is a negative proposition, difficult to prove, *but necessary in order to charge a party with a criminal offence.*" On that ground, the conviction was set aside.

In such cases, the presumption in favor of innocence overcomes the presumption, which would otherwise arise, of the non-existence of the fact not proved. To rebut such counter and stronger presumption, some positive evidence to establish the negative, is necessary. *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Phillips' Evid.* 196. The negative in regard to naturalization would ordinarily be much more difficult to prove, than it would be in regard to residence, but the principle of both causes is the same. *Rex v. Rogers*, 2 Campb. 654; *Rex v. Twyning*, 2 B. & Ald. 386; *Hicks v. Martin*, 9 Mart. (La.) 47; 1 Cow. & Hill's Notes 423, n. 325. Full and conclusive proof, where a party has the burden of proving a negative, is not required; but even vague proof, or such as renders the existence of the negative probable, is, in some cases, sufficient to change the burden to the other party. *Calder v. Rutherford*, 3 Brod. & Bing. 302. The last request of the

(Evidence in contested election cases.)

plaintiff's counsel was, therefore, properly overruled. The judgment of the supreme court should be affirmed.

Judgment affirmed.

EMOTT, ROSEKRANS and BALCOM, JJ., concurred.

DENIO, C. J., and WRIGHT and MARTIN, JJ., dissented.

---

The principal question decided in *People v. Pease*, is as well settled as any question can be, both on English and American authorities. See *Carpenter v. Ely*, ante 258; *Reed v. Cosden*, 1 Cong. Elect. Cas. 353; *Adams v. Wilson*, Ibid. 373. So also, it would appear to be well established in England, that the declarations of a voter may be given in evidence to prove his want of the legal qualifications. Tomlins on Evidence in Election Cases 153, 173; 2 Dougl. Elect. Cas. 308-9; 3 Ibid. 12-13; 1 Peckwell 304; 2 Ibid. 395. And this was decided to be the law, in Wisconsin, in the case of *State v. Olin*, 23 Wis. 310, 319. But see the Case of *Dresden*, Cush. Elect. Cas. 201.

That the presumption of innocence, where one who is alien-born has voted at an election, will prevail over the counter-presumption that he is still an alien, is also sustained by authority. *New Jersey Case*, 2 Cong. Elect. Cas. 19. The presumption of innocence is a favorite with the law, and though it may be rebutted by presumptive evidence, even in capital cases, it obtains both in criminal and civil proceedings; thus, in *Rex v. Twynning*, 2 B. & Ald. 386, it was held, that where a woman married within a year from the time when a preceding husband had been heard of, there was a presumption that the first was dead when she married the second, and that it was incumbent on the other party to give evidence to the contrary. "This is a case of conflicting presumptions," said Mr. Justice Bayley, "and the question is, which is to prevail? the law presumes the continuance of life, but it also presumes against the commission of crime; and that, even in civil cases, until the contrary be proved. The case of *Williams v. East India Co.*, 3 East 192, decided that the *onus probandi* lay, in such cases, on the other side; for though, in ordinary cases, it would have been the duty of the defendants to have proved the notice, the court held, that inasmuch as the combustible matter would have been a crime in the party

(Evidence in contested election cases.)

delivering it, it became necessary for the plaintiff to prove that no such notice had been given. And in *Rex v. Hawkins*, 10 East 211, where the objection was, that the defendant had not taken the sacrament within the year, and it was said in answer, *non constat*, that the other party had not equally omitted to do so, the court held, that the presumption was that he had conformed to the law." *Breiden v. Paff*, 12 S. & R. 430, was a case of the same stamp.

As in all other cases, the evidence in a contested election must be relevant to the issue; this principle was carried to a great extent in the case of *Reed v. Kneass*, 1 Phila. 162-8, where the question was, whether or not the election officers had made a fraudulent return against the contestant by giving him but 94 votes, when it was alleged that, in point of fact, he received 150; it was proposed to be shown that, prior to the election, the witness visited the contestant on several occasions; that it was agreed, that the witness should be one of the clerks of the election, the contestant being desirous that some person favorable to himself should be among the officers; that he so acted, and that he received a sum of \$50 to favor the claims of Mr. Reed, though not for the purpose of corrupting him as an election officer; the court, however, rejected the evidence as irrelevant. It would seem, that the fact that one of the clerks of the election was the paid agent of the contestant, ought to have had some bearing on that case. But every point was ruled against the respondent, by the majority of the court, from the commencement of the hearing. No case has exercised such a mischievous effect on elections in Pennsylvania as that of *Reed v. Kneass*.

It is competent for the contestant to prove that a man noted on the poll-list, as voting, did not vote; that certain persons voted more than once, though the names in which they voted were not given; that one who voted was not a qualified elector; that certain persons whose names were unknown voted twice; that certain persons were assessed in a previous year, but were not found when the assessment was made prior to the election contested; that search had been made for persons alleged to have voted illegally, and the result thereof; but what was said at a particular house is not evidence; after search made for the list of taxables in the box, and failure to find it, a witness may be asked, whether he saw the list at the poll, and whether the officers wrote anything in the book, on election day; it is also competent to show whether voters were challenged, were sworn and what they said. *Mann v.*

(Evidence in contested election cases.)

Cassidy, 1 Brewst. 12. It is also competent to show that an election officer stated, the morning after the election, that there was a discrepancy between the ballots and the return; also, that a person who voted was *non compos mentis*, without a finding in lunacy; it may be shown for what ticket an unqualified voter asked at the poll; that no scratched tickets were voted, or that a ticket voted by one not qualified had a mark on it by which it could be identified; but it is not competent to show the description of ticket a man voted, by the type or its size; nor what the distributor of tickets said, at the poll, as to the tickets he was handing out; nor what ticket the person was distributing, from whom an unqualified voter obtained his ballot; nor whether all the tickets of a certain party had on them the name of a particular person; nor can an unqualified voter be asked, what ticket he voted? the question should be, for whom did you vote for a certain office? so, a witness called simply to prove the hour in which he voted, cannot be cross-examined as to his qualifications. Thompson v. Ewing, 1 Brewst. 68-9. The fact of the residence of an elector, can be proved by others than the voter himself; but the testimony of persons who searched for and did not find certain voters in the election division, is entitled to but little weight. Weaver v. Given, 1 Brewst. 140.

# REED v. KNEASS.

In the Court of Quarter Sessions of Philadelphia.

MARCH SESSIONS 1851.

(UNREPORTED.)

## [*Evidence—rebutting testimony.*]

Rebutting testimony is a thing dependent upon the sound discretion of the court, provided always, that it be relevant to the case.

It does not follow, that because testimony may be admissible in chief, it is not to be received by way of rebuttal.

In an election case, evidence is essentially rebutting, if it tend to explain away circumstances which have been advanced on behalf of the respondent, in order to destroy or affect the testimony which has been adduced by the contestant to sustain the allegations of his complaint.

This was a proceeding to contest the election of Horn R. Kneass, who had been returned as duly elected to the office of district-attorney for the city and county of Philadelphia, at the general election held in October 1850.

It was alleged in the complaint, that the election officers of the Second ward, Moyamensing, had added to the list of voters a large number of names of persons who had not voted at that election. The aggregate of votes returned was 1223. The contestant, to sustain this allegation, proved that a Mr. Landon, who was No. 878 on the poll-list, voted about fifteen minutes before the time of closing the polls, and that, at that time, but few persons were voting and there was no press at the polls. To contradict this inference, the respondent proved by the assessor, that John Robbins, whose name was No. 957 on the poll-list, was duly assessed as a resident in Shippen street above Tenth street in that ward. The contestant, in rebuttal, called as a witness one Jeremiah Robbins, who stated that he resided in Tenth street the first door above Shippen street; that no person by the name of John Robbins

(Evidence—rebutting testimony.)

resided there; and that there was no other J. Robbins in the ward but himself. The counsel then proposed to ask Mr. Robbins whether he voted at the last election, which was objected to on the other side.

The question of the admissibility of the testimony was argued by *Hirst* and *J. M. Read*, for the respondent; and by *St. Geo. T. Campbell* for the contestant.

KING, P. J., delivered the opinion of the court. I have given this question much deliberation and reflection, and the conclusions I have arrived at, are the deliberate result thereof. In a court of justice, there are two sorts of testimony, direct and positive, and circumstantial and presumptive. Direct and positive testimony, as well as circumstantial and presumptive, given by a party plaintiff or complainant, may, of course, be rebutted by his opponent; positive testimony he may rebut by positive testimony, or by circumstances outweighing the effect of that positive testimony; and so with presumptive or indirect testimony. Now, in this case, the contestants, in order to sustain their position, allege that, after a certain hour, on the night of the election, a large number of votes were added to the list, of individuals who never, according to the circumstances proved by them, could have *bonâ fide* given their votes, as set forth in the election papers. To establish this fact, among other things, they brought Mr. Landon, whose name is on the poll-list, No. 878, to prove that he voted between 10 and 20 minutes before ten o'clock; that, at that time, there was no press at the polls; that very few persons were voting; and that he left the polls, and proceeded to his house, in the vicinity, and that on his arrival there, the clock struck ten; from this testimony, the contestants seek to infer, that the return of the officers *must* be fraudulent, since it is a moral impossibility, if Mr. Landon voted No. 878, at 15 minutes before ten o'clock, for 345 more votes, which are necessary to constitute the

(Evidence—rebutting testimony.)

aggregate of 1223, to have been given. Of course, the respondent found it expedient and proper to endeavor to shake the effect of that testimony; to accomplish this, he first produced persons who actually voted, whose numbers are long subsequent to Mr. Landon's; secondly, he called witnesses to show the appearance of individuals on the ground, whose names are on the list long posterior to Mr. Landon's; and thirdly, he called the assessor, to show that many of the individuals, whose names are supposed to be fraudulently interpolated on the list, have the same names as persons that he had assessed at their proper residences. In connection with the last point, the respondent produced the official list of voters, to prove that many of the persons assessed were of the same name as the person who purported to have voted posterior to the time when this fraud is alleged to have been perpetrated.

It is perfectly competent to rebut all the statements thus offered by the respondent, and such evidence would be strictly rebutting testimony. You can rebut, not only the positive testimony directly tending to sustain any position attempted to be taken in a judicial inquiry, but you can explain away the circumstantial testimony, by which your antagonist has proposed to support any position taken by him. As to positive testimony, I presume it is not disputed; for instance, a party swears he voted No. 1221, and his name is A. B.; you could certainly show, by a person having the same name, and duly assessed, that he did not vote, and that there was but one person of that name in the ward; this would not be disputed, as it would be the highest order of rebutting testimony. Can you not also contradict circumstances amounting to less than positive testimony? I think so; and we have done it with the last witness examined in this case; for example, a man named Winters is described as voting No. 947; Mr. Ringland was examined, and testified that he saw Mr. Winters on the ground, and that to the best of his recollection, he voted; he did not say he actually



(Evidence—rebutting testimony.)

voted, but it was a strong expression of opinion to that effect, though not a positive assertion of the fact. What inference, then, was proposed to be drawn from the testimony of Mr. Ringland? was it not, that Mr. Winters had voted? and if his testimony had not been explained, who would have hesitated in believing that Winters voted? When it became important to show circumstances countervailing this, how was it done? by producing Mr. Winters, who swore that he had not been on the ground the whole day; that took away the force of Mr. Ringland's testimony, and showed that he was mistaken in his impression. The admissibility of this was so clear, that it was not objected to by the counsel for the respondent.

But there was a third species of evidence offered—evidence tending to show the *probability* that the parties alluded to actually voted. The assessor being called said, he assessed certain individuals, among others, John Robbins (the witness now offered to rebut), a jeweller, living in a part of the district designated by him; the counsel, immediately after that, turned and said, Mr. Robbins' number was 957. Was not proof that Mr. Robbins was a duly-assessed inhabitant of Moyamensing, coupled with the name of the same person at 957, strong presumptive evidence to show that the John Robbins assessed was the John Robbins who voted at 957? suppose such a proposition submitted to a jury, to establish the fact, that John Robbins voted in Second ward, Moyamensing; what better presumptive testimony could you produce, than to show the assessment of John Robbins in that ward, and the fact that a person of that name voted? Would it not even be conclusive evidence of that fact, unless rebutted by testimony tending to countervail it, or unless the return were so utterly without credit, as not to be worthy of consideration? I say, it would. If this testimony have such a tendency, is it not competent to contradict it? is it not competent to show that, although the court might infer,

(Evidence—rebutting testimony.)

from the fact that a person voted at 957, named John Robbins, and that a person of that name was actually assessed, that vote was not given, because the John Robbins assessed was not the person who voted? To my mind, it is perfectly clear, that inasmuch as the testimony offered to show that John Robbins voted, was circumstantial, arising from the fact of there being such an assessed inhabitant of the ward, it is competent, by way of rebuttal, to show that the John Robbins so assessed in the ward did not vote.

It was said in the argument, that the assessor's list with the accompanying proof, was offered by the respondent for a different purpose; to contradict the effect of the statement of Mr. Miller, who alleged, he was not familiar with any of the persons contained in the long list referred to him, as inhabitants of the ward. But the testimony had another tendency; and no matter for what purpose testimony may be offered, if, in addition to its professed object, it have a tendency to establish something else, clearly affecting the case, the party on whom such testimony so bears, has a right to rebut that something; otherwise, I can imagine, that a man of talent, familiar with the conduct of a case, might introduce testimony for a collateral and secondary object, and yet, it might have the most direct and overwhelming influence upon the main question. Will the court, then, say, "we will not hear rebutting evidence, countervailing such testimony, because such countervailing testimony has not, necessarily, a tendency to rebut that for which the testimony in chief purported to be offered," although the court, at the same time, are conscious that it had another and more decided influence. To my mind, the proposition is clear, that the court should look to things, and not to words; they should look to the actual effect of such testimony, and rebutting evidence to meet that effect should be admitted.

Again, rebutting testimony is, after all, a thing dependent upon the sound discretion of the court, provided

(Evidence—rebutting testimony.)

always, that the testimony is relevant; and the courts of Pennsylvania have gone very far upon this subject. To this effect, we have the authority of Chief Justice Tilghman, in *Richardson v. Stewart*, 4 Binn. 198, where he declares, that material testimony ought not to be rejected, merely because offered after the evidence is closed on both sides, unless it has been kept back by trick, or the adverse party would be deceived or injured by it. The same doctrine is asserted in *Devall v. Burbridge*, 6 W. & S. 529, where Judge Huston declares, that it requires a strong case, to authorize the absolute rejection of material testimony in any stage of the cause. Now, I myself, if I am justified in quoting my own experience, have admitted testimony after the case was closed; and for what? to advance justice and promote right; for those great purposes, the rule is, to receive material testimony offered at any stage, provided, the offer be made *bonâ fide*, under the stress of unforeseen circumstances, and unaccompanied by trick or fraud.

One more remark is called for by the line of argument of the counsel for the respondent—it does not follow, because testimony may be admitted in chief, it may not be admitted by way of rebuttal. The contrary is a matter of every-day practice; any judge who has ever tried criminal cases, to any extent, knows, that if a party be indicted, for instance, for assault and battery, and twenty witnesses be summoned to prove it, three of whom are examined, the court will say to the parties, “you can stop here;” and afterwards, if the prosecutor be found to be pressed by the defendant’s testimony, his original testimony is then admitted by way of rebuttal. I refer to these doctrines, generally, to show that the admissibility of rebutting testimony, is always founded upon the sound discretion of the court, exercised for the promotion and advancement of justice, but guarded in such a way as to prevent the surprise of the opposite party; the court always giving an opportunity, as will be given in this case, of responding to

(Evidence—rebutting testimony.)

the testimony thus produced, if the party be, or appear to be, unfairly affected by it.

The essential ground, however, on which I rest my opinion, is, that the evidence offered is essentially rebutting testimony, and that it tends to explain away circumstances, which have been advanced on behalf of the respondent, in order to destroy or affect the testimony which has been produced by the contestant to sustain the allegations of his complaint.

Objection overruled.

CAMPBELL, J., dissented.

---

In Maryland, a judge of election, sued by a person whose vote he had refused to receive, having testified that he rejected the plaintiff's vote, because of his known disloyal sentiments, and that he was not governed by any bias or prejudice against the plaintiff; it was held, that to rebut this evidence, and show malice on the part of the defendant, it was competent for the plaintiff to prove, that the defendant, as register, had registered a person who, at the time, declared the same disloyal sentiments, for the expression of which the defendant claimed to have rejected the plaintiff's vote. *Elbin v. Wilson*, 33 Md. Evidence in rebuttal should be contradictory of that produced by the defendant, but not inconsistent with the plaintiff's evidence in chief. *Husted v. Gardener*, 28 Leg. Int. 140.

## PEOPLE v. COOK.

In the Court of Appeals of New York.

MARCH TERM 1853.

(REPORTED 8 NEW YORK 67.)

*[Irregularities will not vitiate the poll.]*

Where the pleadings raise a question of fraud in relation to the acts of a board of election officers, and the evidence goes only to show an irregularity, without fraudulent intent, the court is not bound to submit it to the jury as an open question.

Fraud, when imputed to the acts of inspectors of election, implies an illegal and wrongful act, purposely committed.

An irregularity in conducting an election, which does not deprive a legal voter of his vote, nor admit a disqualified person to vote, if it cast no uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it, may be overlooked in a *quo warranto*.

The county-board has no right to reject a return, which is regular on its face, and delivered to the proper officer, within the time prescribed by law.

The hour of closing the polls is directory, not imperative.

Appeal from the Supreme Court, at a general term, in the sixth judicial district. This was an action in the nature of a *quo warranto*, at the relation of Benjamin Welch, Jr., to try the right of the defendant to the office of state treasurer, to which he had been returned, by the board of state canvassers, as duly elected, at the election held in November 1851. The case was tried at Tompkins circuit in March 1852, when a verdict was rendered in favor of the plaintiffs, upon which judgment was entered, and this judgment was affirmed at the general term. The case in the supreme court is reported in 11 Barb. 259.

*J. C. Spencer*, for the appellant.

*J. A. Collier*, for the respondent.

WILLARD, J., delivered the opinion of the court. This action was commenced by the attorney-general in January

(Irregularities will not vitiate the poll.)

1852, under Tit. 13, ch. 2, § 432 of the Code of Procedure. The general object of the action was, to determine whether the defendant or Benjamin Welch, Jr., was, by the greatest number of votes, elected treasurer of this state, at the general election in 1851. The cause was tried at the Tompkins circuit in March 1852, when a verdict was found for the plaintiffs, under the direction of the court, and the supreme court in the sixth district refused to set it aside on the bill of exceptions taken at the trial, gave judgment against the defendant, with costs, and adjudged that Benjamin Welch, Jr., was entitled to the office. The defendant appealed from the said judgment to this court.

The mode of testing the title of a party to an office, prior to the Code, was by information in the nature of a *quo warranto*. 2 Rev. St. 581. Although this partook of the nature of criminal proceedings, by reason of the judgment being, in some cases, followed by a fine (2 Rev. St. 585, § 48), yet, it was classed with civil remedies, in the third part of the revised statutes. The 428th section of the Code abolishes the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, and enacts that the remedy theretofore obtainable in those forms, may be obtained by *civil actions*, under the provisions of that chapter. The present action was brought under those provisions, and is therefore a civil action; the decisions of the court below are to be reviewed upon the principles applicable to civil actions, and not by those which prevail in criminal proceedings, when the latter differ from the former. The parties, in fact, stand in the same relation to each other as in other civil actions; each, on being defeated, is liable to the other, as well for the ordinary costs of the action, as for an extra allowance. Code, § 308, 309; *People v. Clarke*, 11 Barb. 337. This is so, whether the People or Benjamin Welch, Jr., be considered as the real plaintiff. Code, § 319.

The issue framed by the pleadings was intended to raise

(Irregularities will not vitiate the poll.)

not merely the question, which party had obtained the certificate of the state canvassers, about which, indeed, there was no dispute, but which party, Mr. Welch or Mr. Cook, was, in truth, *elected* to the office in controversy. The complaint, among other things, alleges "that Benjamin Welch, Jr., of the county of Erie, is rightfully entitled to the said office of treasurer, and the said defendant has no right thereto;" and it further alleges "that at the annual election in 1851, the said Benjamin Welch, Jr., was, by the greatest number of votes given at that election for the office of treasurer of the said state, duly elected to that office." The defendant, in his answer, after setting out his title to the office under the certificate of the state canvassers, his giving the requisite security, and taking the prescribed oath, alleges on "his information and belief, that at the said general election, the greatest number of votes, duly given by the qualified electors who voted for any person for the office of treasurer, was given for the defendant for such treasurer." The reply impeaches the certificate of the state canvassers, for various irregularities; and especially, for the omission to canvass in favor of Mr. Welch the votes of the second election district of Chesterfield, in the county of Essex, and the votes of the second election district of the 14th ward of the city of New York; and sundry ballots for Benjamin C. Welch, Jr., and Benjamin Welch; and it avers that the votes so given and intended for the said Benjamin Welch, Jr., and those not canvassed in his favor from Chesterfield and New York, were enough to elect him by the greatest number of votes to the office in question.

The issues thus framed, as well as the mode pursued by the respective counsel, on the trial, show that the parties intended to litigate, and did in fact litigate, the question whether Benjamin Welch, Jr., received, at the general election in 1851, a greater number of votes for the office of state treasurer, than the defendant. It was not denied, that the state canvass afforded *prima facie* evidence that

(Irregularities will not vitiate the poll.)

each of the candidates received the number of votes allotted to him, and that their certificate was *primâ facie* evidence that the defendant received a majority of the votes. Like all other *primâ facie* evidence, it was supposed to be open to contradiction. These preliminary remarks will prepare us to consider the various questions which have been urged on this appeal.

As the most important questions arise upon the judge's final disposition of the cause, at the close of the trial, it is proper to ascertain the precise questions then determined. On the close of the proof, the counsel for the defendant claimed that there should be submitted to the jury, as questions of fact: 1. Whether there was any fraud as to the manner of closing the polls, and in canvassing the votes, in the second district of the 14th ward of the city of New York? 2. Whether the votes given for Benjamin C. Welch, Jr., and Benjamin Welch, were intended to be given for Benjamin Welch, Jr.? It was conceded, that all other questions were questions of law and not of fact. The judge declined to submit either of these propositions to the jury; holding that there was no evidence to sustain the allegation of fraud, and inasmuch as the evidence adduced to establish the intention of the electors, who voted the ballots having on them the name of Benjamin C. Welch, Jr., and Benjamin Welch, without the addition of junior, was all on one side, not attempted to be explained or contradicted, and sufficient to establish, *primâ facie*, the intention of those who deposited them, to vote for Benjamin Welch, Jr., no question of fact was, therefore, left for the jury. The defendant's counsel excepted to this decision. The whole cause was then submitted to the judge, without argument, and he decided certain points, which will be noticed hereafter, to some of which the defendant's counsel excepted; and the jury rendered a verdict for the plaintiff, under the direction of the court, to which direction counsel also excepted.

The decision of the learned judge on the two points



(Irregularities will not vitiate the poll.)

above mentioned, depends upon the same principles, and I shall, therefore, consider them together. The fact assumed by him, that there was no evidence of fraud, in the one case, and in the other, that the intention of the voters was *primâ facie* established, was not denied by the counsel for the defendant; it was not pretended, that the defendant had given any evidence contradicting that on the part of the plaintiff; nor did the counsel point out any distinct fact, as evidence of fraud, in the New York case. (As to the effect of a fact assumed by the court, and not denied, see 19 Wend. 444.) The objection, therefore, comes down to a mere question of form, whether the judge is bound to submit to the jury, as an open question, to find fraud, without evidence, in the one case, or in the other, to find against a fact *primâ facie* established, and which the other party has not attempted to controvert or explain; or whether he may direct a verdict in conformity to such evidence. This presents a point of practice at *nisi prius*, which must be settled according to the usage in this state.

This subject may be presented in three aspects: 1. As to the practice on a demurrer to evidence: 2. On a failure of proof on the part of the plaintiff: and 3. On a failure of proof on the part of the defendant.

1. On a demurrer to evidence, the party demurring must admit every fact which the jury might find from the testimony. The decision of the cause is thus wholly withdrawn from the jury to the court, and the former have nothing further to do than, in a proper case, to assess contingent damages. *Gibson v. Hunter*, 2 H. Bl. 187; 1 Dougl. 129, per Buller, J.; 3 Johns. Cas. 10, 159; 2 Cowen 133, 134; 1 Johns. 241; *Lewis v. Few*, 5 Johns. 1; *People v. Roe*, 1 Hill 470. In the present case, there was no demurrer to evidence, for the cause was, in truth, passed upon by the jury, who gave a verdict for the plaintiff.

2. On a failure of proof on the part of the plaintiff, it

(Irregularities will not vitiate the poll.)

is well settled in this state, and has been for half a century, that the plaintiff may be compelled to be nonsuited, against his consent. *Clements v. Benjamin*, 12 Johns. 299; *Pratt v. Hull*, 13 Ibid. 334. And it is laid down as a general rule, that if the evidence would not authorize the jury to find a verdict for the plaintiff, or, if the court would set it aside, if so found, as contrary to evidence, in such case, it is the duty of the court to nonsuit. *Stuart v. Simpson*, 1 Wend. 376; *Demeyer v. Souzer*, 6 Ibid. 436-8; *Wilson v. Williams*, 14 Ibid. 146; *Fort v. Collins*, 21 Ibid. 109; *Jansen v. Acker*, 23 Ibid. 480; *Rudd v. Davis*, 3 Hill 287; *McMartin v. Taylor*, 2 Barb. 356, 361. This rule was sanctioned by the unanimous opinion of the court of errors, in *Rudd v. Davis*, 7 Hill 529. The English practice on this subject is different, as they never nonsuit the plaintiff, against his consent. 2 T. R. 281; 1 B. & Ald. 252. Hence, with them, one of several defendants is never discharged, if there is the slightest evidence against him. There are *dicta* to the same effect, by judges in this state, when their attention has not been called to the difference between our practice and that of the English courts. See 4 N. Y. 548, per Mullett, J. The true rule is, that a defendant sued in tort with others is entitled to be discharged, if the evidence against him be such that, if he were sued alone, he would be entitled to a nonsuit. *McMartin v. Taylor*, 2 Barb. 356. The power to nonsuit results from the principle that the court is the judge of the law, when there is no dispute about facts, *Pratt v. Hull*, 13 Johns. 334, approved by Mullett, J., in *Labar v. Koplin*, 4 N. Y. 548. The practice in relation to nonsuits, or, in present phraseology, dismissing the complaint, is, that it may be granted at the close of the evidence on both sides, or at any other time, when the plaintiff admits he has no further evidence.

3. On a failure of proof on the part of the defendant. At the close of the cause, if a *prima facie* case be established on the part of the plaintiff, and it be undisputed by

(Irregularities will not vitiate the poll.)

the defendant, it has always been usual to direct a verdict for the plaintiff. See *Nichols v. Goldsmith*, 7 Wend. 160; *Crawford v. Wilson*, 4 Barb. 504, 518; *Rich v. Rich*, 16 Wend. 676. This rests upon the same principle as the power to nonsuit, that the court is the judge of the law, when there is no dispute about facts. Verdicts to an immense amount are daily taken under the direction of the presiding judge, in cases where the defence has wholly failed; the jury assent to the direction, by giving their verdict. The fact thus found is as conclusive upon the parties as if it had been the result of a long deliberation. Nor is there anything in this practice, that impairs the rights of the jurors, or the efficiency of trial by jury; it does not conflict with the maxim, *ad questionem facti non respondent iudices, ad questionem juris non respondent iuratores*. Co. Lit. 295 b. To bring a case in hostility to the maxim, it must be shown that a *controverted* question of fact was decided by the judge, without the intervention of the jury.

Here was no fact in dispute, and the jury actually gave a verdict. In the case of *People v. Croswell*, 3 Johns. Cas. 337, the rights of jurors were most elaborately discussed; in his 13th proposition (*Ibid.* 361), General Hamilton remarks, "that in the general distribution of powers, in any system of jurisprudence, the cognisance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive; that in civil cases, it is always so, and may rightfully be so exerted." And it was expressly asserted by Kent, J., in delivering his opinion in the same case (*Ibid.* 376); the opinion of the judges in criminal cases, he observes, "will generally receive its due weight and effect, and in civil cases it can, and always ought, to be ultimately enforced, by the power of setting aside the verdict." These principles were quoted with approbation by the supreme court, in *Snyder v. Andrews*, 6 Barb. 48, and have been approved in many other cases. The judge

(Irregularities will not vitiate the poll.)

did not, in the present case, decide the question of fact; he withdrew nothing from the jury; his decision amounted only to a charge to find those issues for the plaintiff. The jury might have refused to do so, or have found the other way, without being liable to punishment; the only remedy for such a verdict would have been, to set it aside; but the jury acquiesced in the direction, and found for the plaintiff. The cases which show that it is not competent for the court to direct a verdict for the plaintiff, subject to the opinion of the court, against the consent of the parties, are not applicable to the question we are considering. *Ely v. Adams*, 19 Johns. 313; *Hyde v. Stone*, 9 Cow. 230. The principle decided in *Nichols v. Goldsmith*, 7 Wend. 163, and *Rudd v. Davis*, 3 Hill 287, affirmed in error 7 Hill 529, *Crawford v. Wilson*, and *Rich v. Rich*, *supra*, sustain the ruling of the court below.

If the refusal of the learned judge to submit the foregoing questions to the jury, be deemed a refusal to permit the defendant's counsel to address the jury thereupon, it was not the subject of an exception. Whether counsel shall be permitted to address the jury, is a matter resting in the sound discretion of the court; this has always been so treated. Under the former constitution, there was a time when all causes originating in justices' courts were required to be submitted in the supreme court, without an oral argument. The courts in this state have for a long time limited the number of counsel to address the jury, when a cause is to be summed up, and to examine and cross-examine witnesses. The convention of judges held in August last, under § 470 of the code of 1852, embracing the judges of the supreme court, superior court of New York, and court of common pleas of that city and county, by a general rule, restricted the number of counsel to be heard on each side, at general and special terms, to one, and the time beyond which they should not be heard, to two hours each. See Rules 13 and 14. A similar rule exists in the supreme court of the United States; and this

(Irregularities will not vitiate the poll.)

court limits the number to be heard on a side. All these restrictions imply that the right to address the jury or the court, is not an absolute unqualified right, to be exercised by as many counsel as may be employed.

The courts, on the same principle, limit the number of witnesses to be examined on a side, on all collateral issues; *Nolton v. Moses*, 3 Barb. 36; *Spear v. Myers*, 6 Ibid. 445; and doubtless may do so on the main issue. On the same principle, too, it rests in the discretion of the court, whether a witness, once examined, may be recalled and examined further on the same or other subjects. *Law v. Merrills*, 6 Wend. 276, per Walworth, Ch.; *People v. Mather*, 4 Wend. 246; *Cow. & Hill's Notes* 711, 788; *Dunckle v. Kocker*, 11 Barb. 387. If the judge, at the trial, err in the exercise of this discretion, the remedy is by motion for a new trial on a case; it is well settled that a bill of exceptions cannot be taken, to review the exercise of discretionary power. *Cow. & Hill's Notes* 711, 788, where many of the cases are collected. In this aspect of the case, then, an appeal will not lie for the refusal of the judge to permit the counsel to address the jury on the questions now under discussion, there being no question of damages to be passed upon. In point of form, therefore, on the facts assumed by the learned judge, there was no error in directing a verdict for the plaintiff, instead of submitting the matter, as an open question, to the jury. The manner of stating the question on the record is not according to the usual practice, but it is, nevertheless, intelligible.

I have hitherto treated the case as if the facts in relation to those points were all on one side, as stated by the judge; if so, there was no fact in dispute. Whether the judge was right in that assumption or not, could more properly be reviewed in the court below, on a case containing the whole evidence; the exception does not point to the fact that the judge was wrong in his assumption of what was established by the evidence, but to the legal conclusion which he deduced from it. The learned judges in the

(Irregularities will not vitiate the poll.)

court below have, moreover, discussed these questions of fact in an able and elaborate manner, and shown to my satisfaction, that the judge, at the trial, was right in his assumption; it would be a waste of time to travel over the same ground. It is well settled, also, that when, on the trial of a cause, a fact is assumed by the court and counsel to exist, and the case is disposed of, at the trial, upon such assumption, the non-existence of the fact, in the case presented to the court, on a motion for a new trial, cannot be urged in opposition to the application for a new trial. *Beekman v. Bond*, 19 Wend. 444. This must be so likewise on a bill of exceptions, when the non-existence of the fact is not made a point in the court below. The range of the discussion, however, on this appeal, has made it necessary, or at least expedient, that a few words should be added to this branch of the subject.

1. Of the question of fraud in the New York case. Fraud can never, in judicial proceedings, be predicated of a mere emotion of the mind, disconnected from an act occasioning an injury to some one; a fraudulent transaction implies a wrong done, as well as a person wronged. The term "fraud," when applied to inspectors of an election, implies, *ex vi termini*, that some legal voter has been, designedly and wrongfully, deprived of his vote; or that an illegal vote has been, purposely and unjustly, received by these officers; or that a false estimate has been imposed upon the public as a genuine canvass. In the present case, however, the judge was asked to submit to the jury to find fraud in the inspectors of the second district of the Fourteenth ward in the city of New York, from certain actual or supposed irregularities, in a case where it appears from the record, that it was not shown or alleged on the trial, that any illegal votes were received, or legal votes rejected, and in face of the testimony of all the inspectors, embracing both political parties, and which was not contradicted, that the votes of the district were fairly and honestly received, and accurately canvassed and returned. With respect

(Irregularities will not vitiate the poll.)

to that return, the defendant is the assailant, and holds the affirmative; it will be shown, in another connection, that it should have been received by the county-canvasers; the legal presumption is in its favor. It is no answer to this, that the irregularities of the inspectors have rendered it impossible to detect the fraud. The decision of the learned judge, with respect to these irregularities, belongs to another exception; we are now upon the exception to his decision, refusing to submit to the jury, to find fraud, without evidence, in closing the polls and canvassing the votes in that district. This is quite a different matter from the question of irregularity, and must be kept distinct from it. The judge did not err in refusing the motion of the defendant's counsel in this respect.

2. On the refusal to submit to the jury whether the votes for Benjamin C. Welch, Jr., and Benjamin Welch, were intended for Benjamin Welch, Jr. What that decision, in reality, was, and the grounds of it, have already been shown; a few words more will be added. The court did not treat the *question of the intention* of the voters who deposited the defective ballots, as a question of law; it was treated throughout as a question of fact, to be established by the evidence. The ground taken by the judge was, that the intention of the voters to vote for Benjamin Welch, Jr., was *primâ facie* established, and not attempted to be explained or contradicted, and there was, therefore, no question of fact for the jury; his decision was a mere direction or charge to the jury to find for the plaintiff with respect to those matters, and they found accordingly; the evidence was not withdrawn from them but, in truth, passed upon by them. It was not, indeed, submitted as an open, controverted question, or summed up by counsel; but when that *intention* of the voter was placed beyond dispute, as it was in this case, by the evidence, it became a pure and unmixed question of law, whether those defective ballots should, on this trial, be allowed to Benjamin Welch, Jr., or not. The result was the same as if the

(Irregularities will not vitiate the poll.)

judge had charged the jury that if they believed that the voters intended, by the defective ballots, to vote for Benjamin Welch, Jr., of which there was no doubt, those votes, in point of law, should be estimated by them to Mr. Welch.

It was unnecessary to decide that those defective ballots should have been allowed and canvassed to Benjamin Welch, Jr., by the state-canvassers. The court did not say, as matter of law, irrespective of the extrinsic facts proved, that Benjamin C. Welch, Jr., and Benjamin Welch, without the junior, meant Benjamin Welch, Jr.; it was the extrinsic evidence that made the intention of the voters obvious.

In my own opinion, the state-canvassers act ministerially, in the main, in making their certificate; they cannot be charged with error in refusing to add to the votes for Benjamin Welch, Jr., those which were given for Benjamin C. Welch, Jr., and Benjamin Welch, without the junior; they had not the means which the court possessed on the trial of this issue, of ascertaining, by evidence *dehors* the several county returns, the intention of the voters, and the identity of the candidate with the name on the defective ballots. The judicial power extends no further than to take notice of such matters of public notoriety, as that certain well-known abbreviations are generally used to designate particular names, and the like. It is enough, probably, to say that the legislature has not clothed, either the state officers, or the subordinate boards of inspection, with power to hear and determine, by means of evidence *dehors* the return, the intention of the voters. The strictness with which these boards should be held to the record before them, is dictated by sound policy and enlightened wisdom. Who would desire to see the close of every canvass followed by a rush of heated partisans, to disprove by their testimony the estimate made by the proper authority?

But the question whether the state-canvassers ought



(Irregularities will not vitiate the poll.)

to have allowed to Mr. Welch the defective ballots, is not, necessarily, involved in this case, if this court shall be of opinion, that on the trial of the cause, it was competent to go behind both the certificate and ballot-box, to ascertain the voter's intention in depositing the ballots in controversy. It has been strenuously insisted by the counsel for the appellant, that the court does not possess this power; he insists that the court can go no further in this action than to correct *mistakes* of the returning officers, and to prove facts which show the return to be false, and to make it such as it ought to have been made by the canvassers. Such errors, whether intentional or otherwise, no doubt, can be corrected by this action, and many of the cases referred to on the argument, did not require a more searching remedy. This question is of sufficient importance to be viewed upon principle and authority.

1. Upon principle. It is by the popular expression by the voters, through the ballot-box, that a title is derived to an elective office; the certificate of the board of canvassers is merely evidence of the person to whom a majority of the votes was given. The certificate may, indeed, be conclusive, in a controversy arising collaterally, or between the person holding it and a stranger; but when this proceeding is instituted in the name of the people, it loses its conclusive character, and becomes only *prima facie* evidence of the right. The pleadings in this case, it has already been shown, were so framed as distinctly to present the question, whether the ballots now in controversy were intended by the voters for Benjamin Welch, Jr.; if the issue thus tendered by the plaintiff was irrelevant, the defendant should have moved to strike it out; by taking issue upon it, and going down to trial and litigating the facts involved in it, he concedes its materiality. This concession, it is true, is not conclusive upon the court; but I think it was the intention of the Code, and certainly it was of the pleaders on both sides, that the issue should involve an inquiry into the right to the office

(Irregularities will not vitiate the poll.)

as derived from the highest source of popular sovereignty, and not merely the right derived from the certificate. It will be seen, that the pleadings in this case are essentially different from the precedents under the former practice in analogous proceedings. (See the forms in *People v. Van Slyck*, 4 Cow. 297.)

2. Upon authority. In the case of *People v. Ferguson*, 8 Cow. 102, decided in 1827, a new trial was granted by the supreme court, to enable the relator to prove on the trial of the issue, that votes given for H. F. Yates were intended by the voters for Henry F. Yates. That was an information in the nature of a *quo warranto*, to determine whether Ferguson or Yates was elected clerk of Montgomery county; if, on that trial, 14 ballots on which were written H. F. Yates were allowed to Henry F. Yates, he would be entitled to the office, instead of Ferguson, to whom the certificate was given by the canvassers. That case is exactly in point, and goes further, indeed, than is necessary in the one under consideration. The late Chief Justice Savage, in the course of his opinion in that case, says, you may look beyond the ballot-boxes for testimony as to the intention of the voter, and the question of intention is fairly for the jury. This doctrine was approved by the same court, in *People v. Seaman*, 5 Denio 409, decided in 1848, in a similar proceeding to test the title of the parties to the office of supervisor.

In the earlier case of *People v. Van Slyck*, 4 Cow. 297, an information in the nature of a *quo warranto* was brought to oust the defendant from the office of sheriff. It was insisted by the defendant's counsel, that the decision of the canvassers was conclusive, and could not be reviewed except by *certiorari*; and that their certificate could not be impeached in that way; but the court held, that the certificate was not conclusive; and on a special verdict, finding that the vote of one town had been improperly rejected by the county-board, which, if

(Irregularities will not vitiate the poll.)

received, would have altered the result, they ousted the defendant. This case shows that the court may go behind the certificate; it shows also, that it is the election, and not the certificate of the canvassers, that gives the right to an office.

In *People v. Vail*, 20 Wend. 12, the case of *People v. Ferguson* is expressly recognised as sound law; and Bronson, J., says, that in those legislative bodies which have the power to judge of their own members, it is the settled practice, when the right of the sitting member is called in question, to look beyond the certificate of the returning officers; "and I think," he observes, "a court and jury, with better means of arriving at the truth, may pursue the same course." We are not called upon to say that every possible question arising under the election law, may be corrected in this way; it is enough, that the principle contained in *People v. Ferguson* sustains the ruling of the court below; that case has stood the scrutiny of more than a quarter of a century; and has neither been disturbed by the new constitution, nor the repeated revision of the election law; I see nothing in the present case that requires us to depart from it. Nor is there any danger to be apprehended to the security of our institutions by pursuing this practice. The right to an office is no higher than the right to life, liberty or property; there is no principle that should withdraw the former from the cognisance of a court and jury, to the exclusion of the latter; both will, indeed, be safe under the administration of the ordinary tribunals.

It now remains to notice the other questions of law which are presented by the record.

I. The learned judge decided, in his direction to the jury, that the votes given in the western district of the first ward of the city of Buffalo, were properly canvassed and allowed to Mr. Welch, notwithstanding the inspectors took the oath of office upon a book called "Watts's Psalms and Hymns," and not upon the Gospels, notwithstanding

(Irregularities will not vitiate the poll.)

the challenged voters, and two of the clerks were sworn upon the same book, it being beyond dispute that, in each case, the affiants supposed the book to be a Testament or Bible, and were ignorant of the fact that it was otherwise; to this the defendant's counsel excepted. This exception is not well taken, for two reasons: 1. The neglect of the inspectors or clerks to take *any* oath, would not have vitiated the election. It might have subjected those officers to an indictment, if the neglect was wilful. Laws of 1842, p. 132, § 19, and 2 Rev. Stat. 696, § 38; Election of the Directors of the Mohawk and Hudson Railroad, 19 Wend. 135; Greenleaf v. Low, 4 Denio 168; Weeks v. Ellis, 2 Barb. 320. These and numerous other cases show, that the acts of public officers, being in by color of an election or appointment, are valid, so far as the public is concerned. 2. The oath in this case, though irregularly administered, was a valid oath. If the party taking the oath make no objection to the mode of administering it at the time, he is deemed to have assented to the particular form adopted, and is as liable to all the consequences of perjury, as if it had been administered in strict conformity to the statute. Cow. & Hill's Notes 705; Ibid. 1503; Cady v. Norton, 14 Pick. 236; Commonwealth v. Buzzell, 16 Ibid. 153. The challenged voters were as amenable to an indictment for perjury, as if they had been sworn on the Gospels. The learned judge, therefore, committed no error, in holding that the votes in Buffalo above mentioned, were properly canvassed and allowed to Mr. Welch.

II. The ballots for Benjamin Welch, Jr., in the several election districts of Herkimer county, in which the specimen ballot headed "State," had at the bottom, "for County Judge, Ezra Graves," were properly canvassed and allowed to Mr. Welch. Whatever effect this might have upon the ballot for county judge, it had none upon other candidates upon the state ticket; the statute forbids inserting upon the same ballot more than one name for the *same* office. Laws of 1842, p. 118, § 8. The judge

(Irregularities will not vitiate the poll.)

did not err, therefore, in holding that the Herkimer votes were rightfully allowed to Mr. Welch.

III. There was no good reason for rejecting the votes in the second election district of the town of Chesterfield. There was sufficient proof that the gentlemen acting as inspectors were such *de jure*; and if not, it will be shown under another head, that they were, at least, so *de facto*, and that that was sufficient to support their acts. The county-canvassers of the county of Essex had no right to reject the certificate of the board of inspectors; it was regular on its face and presented to them in time; the statute has nowhere invested them with the power which they assumed to exercise. The 15th section, which authorizes the county-board to depute one of their number to return the certificate of the district-inspectors to those officers, to supply omissions and correct clerical mistakes, if any exist, and to adjourn in the meantime, to allow the corrections to be made, is all the correcting or revising power which the county-board has over the district-board. The corrections in this case are to be made by the latter board, and they are not permitted to alter any decision before made by them. The learned judge was right, therefore, in holding that those votes should be allowed, notwithstanding they had been rejected by the county-canvassers, and were not included in the estimate of the state-canvassers.

IV. The votes given in the second election district of the town of Williamsburgh, were canvassed by the county and state-canvassers, to Benjamin Welch, Jr. The defendant in seeking to reject them, holds the affirmative; he takes upon himself the burden of showing, either that the number of votes has been untruly canvassed, or that some other facts exist which invalidate the certificate. First. From the record it appears that no illegal votes were received in such district, at that election, and no legal votes were offered and rejected; that all the votes given at that election were honestly canvassed to the re-

(Irregularities will not vitiate the poll.)

spective candidates, and a true and faithful return of such votes was made by the inspectors; there was no dispute about these facts, and the evidence was received without objection. The defendant, therefore, failed to show that he sustained injury by any act of the inspectors, or that their certificate did not truly state the result of the popular will at that poll. Secondly. The defendant, failing to show the return false, seeks to reject it altogether, on account of the non-compliance by the inspectors with some of the provisions of the election law. There are various duties enjoined by law on the inspectors, the great objects of which are: 1. To afford to every citizen, having a constitutional right to vote, an opportunity to exercise that right: 2. To prevent every one deprived of that right from voting: 3. To conduct the election in such a manner, in point of *form*, that the true number of legal votes can be ascertained with certainty. If all these objects be accomplished, as they seem to have been in this case, to reject the whole poll because the inspectors failed to comply with every prescribed regulation, would be, as was well remarked by one of the judges in the court below, to place a higher value on the statute regulation, than on the right itself; it would be a sacrifice of substance to form. It is proper, however, to examine these objections, and to see whether the irregularities complained of have rendered the state of the poll in that district so doubtful and uncertain that no reliance can be placed upon it.

The first objection I shall consider, relates to the inspectors of the election. It appears by the record, that the inspectors who opened the polls in the morning were not regularly sworn, and that they were appointed by the supervisors, town-clerk and a single justice, "inspectors of the election for the second district of the town of Williamsburgh, to act until others are appointed;" it was dated November 4th, 1851. It appears that there were inspectors elected for this district, but they were not present at the opening of the polls. There can be no

(Irregularities will not vitiate the poll.)

doubt that this appointment was a colorable authority for those inspectors, and that their acts in that capacity were valid, so far as third persons are concerned; their omission to take the oath in due form did not invalidate their acts.\* The defendant's counsel does not deny that these inspectors were officers *de facto*; but he insists that their appointment made them inspectors for the entire election, and thus vacated the office of the elected inspectors; and if so, the latter could not act at all, and were not even inspectors *de facto*. I think this result would follow, if the inspectors in question had been legally appointed under the 22d section of the act. Laws of 1842, p. 117. But there was a defect in their appointment; the statute contemplates that, at least, two of the justices should sign it, without which, in the country towns, there would not be a majority of the appointing power; in the absence of proof to the contrary, we must intend that there were the usual number of justices in the town;† there not being the requisite number of officers concurring in the appointment, it was defective. There was still another defect; the statute contemplates that the inspectors should be appointed to supply the vacancy of those absent; although it is silent as to the duration of their offices, yet, it is obviously for that election; in this case, they were appointed "to act until others were appointed." The town officers supposed that they had the right of making an appointment, during their pleasure; I think they had no such power. The appointment merely gave them a colorable authority, and did not displace the elected inspectors; the latter, on appearing at the polls, had a right, as inspectors *de jure*, to take the charge of the election and to make the return.

The statute requires that the inspectors, after taking the oath, shall appoint two clerks, who shall take the constitutional oath. Laws of 1842, p. 118, §§ 3, 4. This is

\* See *McFarland v. Purviance*, 1 Cong. Elect. Cas. 131; *McFarland v. Culpepper*, *Ibid.* 221; *Draper v. Johnston*, *Ibid.* 702.

† But see *Ex parte Cline*, 1 Ben. 338.

(Irregularities will not vitiate the poll.)

directory; if no clerks can be procured, the election is not to fail; the inspectors must perform the duty which is ordinarily devolved upon the clerks. The failure of the clerks to take the oath did not render their acts void. The occasional interference of more inspectors than three, does not prejudice the return, since the whole election was conducted by inspectors who were, at least, such *de facto*, and for the most of the time, by those who were such *de jure*.

It is not to be disguised, that there were irregularities in this district for which the inspectors are censurable, and perhaps, liable to be punished by indictment. Had the defendant's counsel contended, on the trial, that these irregularities rendered the state of the canvass uncertain, he should have asked to go to the jury on the question, whether the votes were accurately canvassed or not. By omitting to do so, and by conceding that the questions were ones of law, and not of fact, and allowing it to be proved, without objection, that the votes were accurately canvassed, nothing was left but the abstract question, whether an omission to comply with the statutory requirements in question, *per se*, invalidated the votes of that district. If these requirements be directory and not jurisdictional, the learned judge was right in deciding that the votes were properly allowed. The cases on the subject of what provisions in the statute relative to elections are directory, and what are jurisdictional or imperative, are elaborately collected and examined by the learned judges in the court below, and I do not deem it necessary to review them at large; I will merely refer to some of them. *Doughty v. Hope*, 3 Denio 249; *Elmendorf v. Mayor of New York*, 25 Wend. 696; *Ex parte Heath*, 3 Hill 43; *Jackson v. Young*, 5 Cow. 269; *Stryker v. Kelly*, 7 Hill 9; *People v. Peck*, 11 Wend. 604; 19 Wend. 143. And see *Smith on Statutes* 782, 789, where the cases are reviewed. Upon the analogy of these and other cases, the requirements of the statutes which were not complied with, are clearly directory.



(Irregularities will not vitiate the poll.)

An officer *de facto* is one who comes into office by color of a legal appointment or election; his acts in that capacity are as valid, so far as the public is concerned, as the acts of an officer *de jure*; his title cannot be inquired into collaterally. The doctrine on this subject will be found in the following cases: *People v. Bartlett*, 6 Wend. 422; *People v. White*, 24 Wend. 525, 539, 564; *People v. Covert*, 1 Hill 674; *People v. Stevens*, 5 Hill 616; *People v. Hopson*, 1 Denio 575; *Weeks v. Ellis*, 2 Barb. 320; 3 Barn. & Ald. 266, 270. Third persons can justify under officers *de facto*. *Weeks v. Ellis*, 2 Barb. 320; 3 Barn. & Ald. 266; *Wilcox v. Smith*, 5 Wend. 231. Had the sheriff or constable arrested a disorderly person, under authority from either of the boards of inspectors, who were merely such *de facto*, he would have been protected. The person of the voter is as securely guarded under the authority of inspectors *de facto*, as of inspectors *de jure*; a challenged voter, swearing falsely before a *de facto* board of inspectors, is as much liable to punishment, under the statute, as if the oath had been administered by inspectors *de jure*. Laws of 1842, p. 134, § 1; 2 Rev. St. 681; *State v. Hascall*, 6 N. H. 352; 2 Cow. & Hill 1101; *Van Steenberg v. Kortz*, 10 Johns. 167; *Howard v. Sexton*, 1 Denio 440. In the latter case, Bronson, J., says, "if parties should go to trial before a judge or justice of the peace, who had not taken the oath of office, I think, a witness who should swear falsely on such trial could not escape the pain of perjury." And it is laid down by Hawkins, 1 P. C., ch. 69, § 4, that a false oath, taken before commissioners, whose commission at the time is, in strictness, determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of such demise. Bac. Ab., tit. Perjury, A. Such officers, after the demise of the king, and before notice, are merely officers *de facto*.

The learned judge did not decide that inspectors might lawfully omit, at their pleasure, any of the requirements

(Irregularities will not vitiate the poll.)

of the statute; he merely held, that the votes received in the said district, under the circumstances disclosed, were not to be rejected on the trial of this issue, but should be allowed to the respective candidates. The counsel for the defendant contends, that the failure of the inspectors to comply with any of the various provisions of the statute, is analogous to an erroneous decision of a judge at *nisi prius*, in receiving or rejecting evidence improperly, but the cases are, in no respect, parallel. The error of the judge, in the latter case, has a direct tendency to injure the party against whom the decision is made; the error of the inspectors, in the former case, has no tendency to injure one candidate more than the other; indeed, it has no *necessary* tendency to injure anybody. It is the error, moreover, of the inspectors, and not of the court.

V. The learned judge did not err in his direction to the jury, that the votes in the second district of the fourteenth ward of the city of New York, were improperly rejected by the county-canvassers. It has already been remarked, in considering the Chesterfield case, that the county-board has no right to reject a certificate of the district-inspectors, which is fair on its face, and delivered to the proper officer within the time allowed by law; the county-board should have received and returned these votes to the state-canvassers. This point, however, is not of much importance in this stage of the cause, since either party had a right to go behind the certificate, and show it to be false; had the county-board of New York conducted the canvass legally, the burden of proof would have been shifted from the plaintiff to the defendant.

There are but two points in this part of the case which have not already been disposed of against the defendant, under some one of the preceding heads: 1. Closing the outer door at sundown, and preventing any person from entering the room where the poll of the election was held: 2. Receiving the votes of those already in the room, at the time the outer door was closed, ten or fifteen in all.

(Irregularities will not vitiate the poll.)

In considering these points, it must be borne in mind, that it is not enough for the defendant to show that the poll was kept open *after* sundown, or that the door was shut *before* that hour; such a technical deviation from the direction of the statute, cannot avail him, unless he can also show that the *hour* of opening and closing the poll is of the essence of an election. He did not propose to show that any legal voters were excluded by the act of closing the outer door, or illegal votes received *after* sundown; he conceded that the questions arising upon those facts were questions of law for the court, and the learned judge made his decision, with the fact distinctly appearing, that no legal votes were rejected nor illegal ones received.

It must be borne in mind, further, under this branch of the subject, that the constitution is *imperative* with respect to the *day* on which our annual elections shall be held. Art. III., sect. 9. Should the legislature direct it to be held on a different day, as they are empowered by that instrument to do, such day would be imperative also. The constitution is silent with respect to the *hour* of the day at which the poll shall be opened and closed; the regulation of that matter is thus left to the legislature, and when they do not interfere, to the common law. The statute requires that the poll shall be open, in the cities, at sunrise, and shall be kept open till the setting of the sun. Laws of 1842, p. 118, § 6. 1st. No elector had any right to complain, if the door was shut and the poll closed at sundown; he was not deprived of any right; the act of closing the outer door, at that time, cannot be urged as prejudicial, unless it be shown that some one was prevented from voting: 2d. The receiving of the votes of electors already in the room, has not been shown to be an error prejudicial to the defendant; whether these votes were for him or against him does not appear; if they were all against him, and were now rejected, it would not alter the result; if they were in his favor, he has no right to complain. 19 Wend. 635, 638.

(Irregularities will not vitiate the poll.)

The statute contains no words forbidding the poll to be kept open after sundown, or rendering the election void, if the poll be not opened and closed as therein required. The inspectors may, indeed, be liable to an indictment for the wilful violation of any of the statute regulations, but that is quite a different matter from the point we are considering. If the particular hour of the day for opening and closing the poll be directory, and not imperative, the learned judge did not err in holding that the votes in the district in question should be allowed to Mr. Welch. The cases on the subject of what acts are directory, and what imperative, have already been stated, and need not be repeated. It has been held, with regard to corporations, that the words "between the hour of ten in the morning and two in the afternoon," are not imperative, but merely directory, and an election may well be begun at any other reasonable hour. Ang. & Ames, Corp. 94. The particular hour in the day is not of the *essence* of the thing required to be done; should inspectors, on a cloudy day, or misled by a defective timepiece, close the polls a few minutes before sundown, or receive a few votes after that hour, if the time of day be of the essence of the thing, the whole election for that district would be void. I cannot subscribe to this doctrine; I think the statute is directory. Again, to show more clearly that the hour of closing the polls is directory and not imperative, suppose after every voter in the district had deposited his ballot, the inspectors should have closed the poll, although the sun was still an hour high; or suppose they had kept it open an hour after sundown, and no vote had been offered or received; who, in either case, would have had a right to complain? Not the candidates, surely; for, with respect to them, the whole object of opening the poll at all, had been accomplished. If the irregularity were wilful, the inspectors might, indeed, be punished by an indictment; and this, I apprehend, is the extent of the remedy.

I do not intend to assert that there may not be depar-

(Irregularities will not vitiate the poll.)

tures from the statutory requirement with respect to the time of opening and closing the polls, and with respect to some other matters, which would put in hazard the whole vote of the district; it will be time enough to pass upon such a case when it arises. It is, probably, impracticable to prescribe a rule which will enable us to determine, in all cases, what irregularities of the inspectors will vitiate an election. It may be safely affirmed, that if the irregularity do not deprive a legal voter of his right, nor admit a disqualified person to vote; if it cast no uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it; it may be overlooked, in an action of this kind, where the issue is, as to which candidate received the greater number of votes for a particular office, at a given election.\*

There is nothing in this principle which holds out the slightest invitation to disorder at the polls. Should a gang of rowdies gain possession of the ballot-box, during or after the close of an election, before the canvass, and destroy the whole or portions of the ballots, or introduce others surreptitiously into the box, so as to render it impossible to ascertain the number of genuine ballots, the whole should be rejected. It would, in such case, be the duty of the district-inspectors to certify and declare the fact. But the county-canvassers, with a regular return from the district-inspectors before them, which is fair on its face, have no right to go behind it, and prove that its estimates are unreliable, by reason of rowdyism at the polls or irregularities of the inspectors. They must act upon it as a regular return, and leave the parties aggrieved to their remedy through the courts of justice.

The judgment of the supreme court should be affirmed.

Judgment affirmed.

TAGGART, J., dissented.

\* See *Philips v. Wickham*, 1 Paige 590.

(Irregularities will not vitiate the poll.)

That a mere irregularity on the part of the election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll, is a point sustained by the whole current of authorities; but there has existed a great conflict of opinion, as to what is an irregularity and what is matter of substance. Matters of substance, in the holding of an election, it would seem, may be resolved into such as affect the time and place of election, the due qualification of the officers by whom it is holden, and those affecting the legal qualifications of the electors; but the conduct of the election officers in the performance of the duties enjoined by law, and their observance of the provisions of the statutes in regard to the recording and return of the legal votes received by them, would seem to fall within the description of directory provisions, and any departure on their part from a strict observance of such portions of the election law, to be regarded as irregularities which do not vitiate. See *People v. Schemerhorn*, 19 Barb. 540.

The general principle involved in this discussion, was well considered by Chief Justice Lowrie, in *Commonwealth v. Meeser*, 44 Penn. St. R. 343, where the learned judge says, "no doubt, there are very many cases in which a strict adherence to the letter of the law would be destructive of justice; and it is quite impossible for the law to define with precision all the customary rights of a people, or to express exactly the duties arising from the ever-changing forms of social transactions; there is a very large field of social relations, wherein the law, whether statutory or customary, must ever remain somewhat indefinite, in order to be adapted to society. But is it so with our election law? We think not; all our electoral rights depend on written law, and it only can define them; it is true, that written law depends itself on ulterior principles of natural law; but these principles are subject to very great diversities of application, and lack entirely that definiteness which is an essential quality of law as a rule of common or social conduct. Law is intended to be a definition of those principles, in such form as to fit them for a ready and ordinary use, and to avoid the disputes that necessarily grow out of more general principles; and nowhere is clear and precise definition more needed than in the laws that relate to the organization of society, and to the maintenance of its organic forms. Form is the sole purpose of them, and we must view them formally, and follow them strictly, else the whole society is very apt to be disturbed; no latitude or looseness of administration of the law is tolerable, when it

(Irregularities will not vitiate the poll.)

endangers the peace and order of society; it ought to be so steady, as not to be at all shaken by partisan excitements." And see Lancaster Election, 4 Votes of Assembly 127.

The forms, however, which must be observed, in order to render the election valid, are those which affect the merits. Thus, it is said, in *Juker v. Commonwealth*, 20 Penn. St. R. 493, to be the general rule of elections, that mere irregularities, which do not tend to affect results, are not to defeat the will of the majority; the will of the majority is to be respected, even when irregularly expressed. The same idea is expressed in *Carpenter's Case*, 2 Pars. 540, where the court say, that although the election officers may be liable to punishment for a violation of the directory provisions of the statute, yet, "the people should not be punished for the defaults of their agents." In *Thompson v. Ewing*, 1 Brewst. 107, it was said by Judge Thompson, that while on the one hand, the whole conduct of election officers may (though actual fraud be not apparent) amount to such gross and culpable negligence, such a disregard of their official duties, as to render their doings unintelligible or unworthy of credence, and the results of their action unreliable for any purpose; on the other, the mere neglect to perform the directory requirements of the election laws, or the performance of their duties in a mistaken manner (where there is no reason to believe that the officers acted with bad faith, and no harm has accrued from the negligence or mistake), ought not to be allowed to defeat the expression of the will of the people of an entire district, against whose votes no objection can be made. And see *Mann v. Cassidy*, 1 Brewst. 60; *Weaver v. Given*, Ibid. 157. In Illinois, the rule is thus laid down by Breese, J.: "the rules prescribed by law for conducting an election, are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain, with certainty, the result; such rules are directory merely, not jurisdictional or imperative; if an irregularity, of which complaint is made, be shown to have deprived no legal voter of his right, nor admitted a disqualified person to vote, if it cast no uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it, it may well be overlooked in a case of this kind, where the only question is, which vote was the greatest?" *Piatt v. People*, 29 Ill. 72. The same general principle has been established in New Jersey; *Hardenburgh v. Farmers and Mechanics' Bank*, 2 Green Ch. 68: in Oregon; *Day v. Kent*, 1 Oregon

(Irregularities will not vitiate the poll.)

123: in Minnesota; *Taylor v. Taylor*, 10 Minn. 107: in Iowa; *Dishon v. Smith*, 10 Iowa 212: in Michigan; *People v. Bates*, 11 Mich. 362: in Texas; *McKinney v. O'Connor*, 26 Texas 5: in Kansas; *Jones v. State*, 1 Kansas 279: and in California; *Gorham v. Campbell*, 2 Cal. 135; *Sprague v. Norway*, 31 Cal. 173; *Keller v. Chapman*, 34 Cal. 635. Where, however, the election officers, though acting in good faith, adopted an erroneous rule as to the qualification of voters, which being known as the decision of the board, prevented other voters, similarly situated, from tendering their votes, it was held, that this was an undue election. *Scranton Borough Election*, 1 Luzerne Leg. Obs. 12, Conyngham, J. (post 455). But see *Gibbons v. Sheppard*, 2 Brewst. 74.

It is conceded, on all hands, that time and place are of the substance of every election. *Dickey v. Hurlburt*, 5 Cal. 343. (See *Jacobs v. Murray*, 15 Cal. 221.) And it would seem, therefore, that due notice of the time and place of holding an election ought to be essential to its validity. *Bang v. Lauck*, 5 Cold. 588. On the 17th October 1700, the general assembly of Pennsylvania declared void the election of representatives from Newcastle county, for want of notice to the electors; 1 Votes of Assembly 124: and on the 31st March 1789, the supreme executive council of Pennsylvania set aside the election of justices of Finley township, on the ground that notice of the time of holding the same was not given, according to law; 16 Colonial Records 44. (And see *Northampton Election*, 4 Votes of Assembly 658.) But this reasonable doctrine has not been sustained by the only judicial decisions to be found upon the subject. In Indiana, it was decided, that an election for county auditor was not void by reason of an omission to give public notice that it would take place; *State v. Jones*, 19 Ind. 356: and in New York, a vacancy in the office of judge of the supreme court having occurred on the 23d October 1855, the court of appeals held, that it was competent for the electors of the district to elect a person to fill the vacancy, though no notice had been given by the secretary of state, pursuant to the statute. *People v. Cowles*, 13 N. Y. 350. And see *People v. Brenham*, 3 Cal. 477; *People v. Hartwell*, 12 Mich. 508.

In regard to the place of holding an election, it was determined by the supreme court of California, that if the election officers open the polls and hold the election at a place not authorized by the board of supervisors, and at a distance from the place appointed by such board, without any excuse therefor, the poll must be rejected, as invalid.



(Irregularities will not vitiate the poll.)

Knowles v. Yeates, 31 Cal. 82. And the same point was determined in Pennsylvania, in Chadwick v. Melvin, ante 251. So, it was held in Tennessee, that a failure to open and hold an election in each one of the civil districts of a county, will vitiate the election. Marshall v. Kerns, 2 Swan 68. "Where the law has prescribed the time and place of election, and designated the officers who are to conduct it, a majority may not set up other officers, and hold a separate election; for majorities as well as minorities are bound by law." Jucker v. Commonwealth, 20 Penn. St. R. 493; and see Commonwealth v. County Commissioners, 5 Rawle 75. The rule is the same in New Jersey; Miller v. English, 1 Zab. 317.

With respect to time, it has been determined that, where the law required the polls to be kept open until ten o'clock, and they were closed at eight, the election must be set aside. Penn District Election, 2 Pars. 526. So also, if they be opened at a much later hour than the time prescribed by law. Chadwick v. Melvin, ante 251. So, it was ruled, in Ohio, that if the polls were closed, for any purpose, between the hours fixed by law for holding the election, it would render it illegal and void. State v. Ritt, 16 Am. L. Reg. 88. But this was overruled in Fry v. Booth, where it was held, that the statutory provision that the polls should remain open during the entire day, between the hours specified, was to be regarded as *directory* merely; and that the closing of them during the dinner-hour, did not vitiate the poll. 19 Ohio St. R. 25. Where the polls were kept open, after the proper hour, the election was set aside, on the ground that enough votes had been cast after the legal hour for closing the polls, to have changed the result. Locust Ward Election, 4 Penn. L. J. 341. In Illinois, however, under similar circumstances, it was held, that it must be shown affirmatively, that votes were received after the proper hour which *did* change the result. Piatt v. People, 29 Ill. 54. In People v. Cook, it was decided that the *hour* of closing the polls, in New York, was *directory*, not *imperative*, and that a slight deviation therefrom would not vitiate the poll. (And see Rex v. Pole, 7 Mod. 194; Case of Adams, Cush. Elect. Cas. 391.) An election will not be set aside, because the polls were closed at the hour specified by the statute, though a number of qualified voters were thereby prevented from depositing their ballots. Clark's Case, 2 Pars. 525.

An election must also be conducted by the proper officers; an election held by mere intruders, without title or color of title, may be disre-

(Irregularities will not vitiate the poll.)

garded. *Thompson v. Ewing*, 1 Brewst. 99. But, as was ruled in *People v. Cook*, it is enough that the persons who conducted the election were officers *de facto*, it need not appear that they were such *de jure*. *Thompson v. Ewing*, 1 Brewst. 111-12; *People v. Cook*, 14 Barb. 259; *McKinney v. O'Connor*, 26 Texas 5; *Sprague v. Norway*, 31 Cal. 173; *McCraw v. Harralson*, 4 Cold. 34. Where the state election law prohibits an election officer from being a candidate at the same election, though the fact that a candidate acted as an election officer will avoid the election as to him, it will not affect the other candidates. *Boileau's Case*, 2 Pars. 503 (ante 268); *Wilcox v. Magruder*, 7 West. L. J. 507. The absence of the judge during a portion of the day will not invalidate the return. *Thompson v. Ewing*, 1 Brewst. 99. And a statutory provision that the board of inspectors shall consist of three persons, is directory only; an election held by two only is valid. *State v. Stumpf*, 21 Wis. 579.

The mere misconduct of an election officer, which does not affect the result, will not vitiate the poll; thus, where one of the clerks, from intoxication, was unable to continue his labors, and another was called in to act in his place, who was not sworn, and continued to officiate until the regular clerk was able to resume his duties, the court refused to throw out the poll. *Boileau's Case*, 2 Pars. 503 (ante 268); *Thompson v. Ewing*, 1 Brewst. 108; *Case of Chester*, Cush. Elect. Cas. 664. Nor is it sufficient to invalidate the election of another officer, that the ignorance of the election officers compelled them to call in one who was a candidate at that election, to show them how to make out the returns. *Thompson v. Ewing*, 1 Brewst. 110. So, if the election officers be illiterate, and for that reason a person who is not a member of the election board, nor a clerk, take the ballots from the box and read them to the tellers, at the invitation of the board, this is not such an irregularity as will vitiate the poll. *Sprague v. Norway*, 31 Cal. 173. And the mere position of the ballot-box, though irregular, will not annul the election. *Augustin v. Eggleston*, 12 La. An. 366. See the cases decided in congress in 1 Bright. Fed. Dig. 276.

Perhaps, the most important question which has arisen under this head of the election law is, whether the omission of the election officers to require from unregistered voters, the preliminary proof required by law, is a mere irregularity, or a matter of substance which renders such votes absolutely illegal. It was held in *Kneass's Case*, 1 Pars. 553, that such votes were *prima facie* illegal, but might be counted, on proof that the

(Irregularities will not vitiate the poll.)

parties so voting were actually duly qualified electors. And see *Myers v. Moffet*, 1 Brewst. 230. But this appears to be an erroneous view of the law; if the election officers receive a vote without that preliminary proof which the law makes an essential prerequisite to its reception, such vote is as much an illegal one as if the voter had none of the qualifications required by law. The voter might not be able, on the election day, to produce the legal preliminary proof, and it would not appear to be just to the candidates to permit a vote to be made legal by evidence subsequently procured, which was absolutely illegal when received by the officers. It has been held in Wisconsin, that where there was no registry of the voters of a town, and none of the persons who voted therein, at the election, furnished the affidavit required by law to entitle the vote of an unregistered elector to be received, the whole vote of the town must be rejected. *State v. Hilmantel*, 21 Wis. 566; *State v. Stumpf*, 23 Wis. 630. This we deem the only just view to be taken of the election law, and the only one which will remedy the evil of constantly recurring contested elections. (See *People v. Kopplekom*, 16 Mich. 342.) The rule here indicated was enforced in *Gibbons v. Sheppard*, 2 Brewst. 129, where the court refused credit for every vote *primâ facie* illegal, in which the testimony did not show that, at the time of voting, the offer was supported by the proof which the law demands.

But the duties imposed on the election officers, on the receipt of a vote, whether from a registered or unregistered elector, are plainly directory, and the omission of them cannot, and ought not, to affect the validity of a vote which was legally given and received; thus, the omission of the inspectors, as required by law, to call aloud the respective names of all the electors upon receiving their tickets; the omission of the clerks to report the names of such electors, and to inscribe the letter V on the margin of the lists opposite the names of such electors; and the omission of the inspectors, to note the fact of the production of certificates of naturalization, are clearly mere irregularities which do not vitiate; *Skerrett's Case*, 2 Pars. 515-16 (ante 320); *Kneass's Case*, *Ibid.* 583; *Thompson v. Ewing*, 1 Brewst. 109. So is the omission of the inspectors, in counting the votes, to take out the ballots deliberately from the boxes, and read aloud the name or names printed thereon; *Skerrett's Case*, 2 Pars. 515 (ante 320); the omission to deposit the ballot-boxes with the nearest magistrate, within one day after the election; *Kneass's Case*, 2 Pars. 559 (and see *People v. Cicott*, 16 Mich. 284); and the omis-

(Irregularities will not vitiate the poll.)

sion to file the tally-papers within the time required by law; *Mann v. Cassidy*, 1 Brewst. 31; *Ewing v. Filley*, 43 Penn. St. R. 388; *Howard v. Shields*, 16 Ohio St. R. 191 (ante 378). It is not ground for setting aside an election, that some of the return judges refused to meet on the day prescribed by law, nor that those who did meet, met at an unusual place, where it was shown that their duties were so interfered with by a disorderly crowd, that they could not be performed at the usual place. *Hulseman v. Rems*, 41 Penn. St. R. 396. And see *Ex parte Heath*, 3 Hill 42; *McCraw v. Harralson*, 4 Cold. 34.

It is, of course, no valid objection to an election, that illegal votes were received, or legal votes rejected, if they did not change the majority. *Sudbury v. Strauss*, 21 Pick. 148; *Blandford v. Gibbs*, 2 Cush. 39; *Christ Church v. Pope*, 8 Gray 140; *Ex parte Murphy*, 7 Cow. 153; *State v. Lehre*, 7 Rich. 234; *McNeely v. Woodruff*, 1 Green 352; *People v. Cicott*, 16 Mich. 295; *People v. Tuthill*, 31 N. Y. 550; *Matter of Chenango Mutual Insurance Co.*, 19 Wend. 635.

## SCRANTON BOROUGH ELECTION.

In the Quarter Sessions of Luzerne County, Pennsylvania.

NOVEMBER SESSIONS 1860.

(REPORTED 1 LUZERNE LEGAL OBSERVER 12.)

### [*Powers of the courts.*]

The court has power to set aside an election, as undue, if the election officers adopted an erroneous rule as to the qualifications of voters, which prevented certain legal voters from giving their votes, and being made known as their decision, prevented other legal voters, similarly situated, from offering their votes; especially, if it appear, that such votes, if offered and received, would have changed the result or have left it in doubt.

The provisions of a borough charter requiring six months' residence and payment of a borough tax, as a qualification for a voter at an election for borough officers, do not apply to electors of township officers and officers of a similar character within the borough; the qualifications of such electors are governed by the constitution and general laws.

If the election officers applied such special provisions to voters for township officers, &c., it is sufficient ground for setting aside the election.

The courts have no jurisdiction to try a contested election of officers to conduct an election.

The right to a strictly charter-office can only be determined in a *quo warranto*.

In case of a vacancy in a charter-office, it is to be filled by a new election, held under the act of 1834; otherwise, as to overseers and constables.

CONYNGHAM, P. J., delivered the opinion of the court. The evidence shows great irregularities in conducting the election in contest, the effect of which it is not necessary for us, in our view of the case, to consider; so far as the court, under the present complaint, *can* investigate the matter, it seems to be our duty, for other reasons, to set aside the election. In so doing, however, we are not called upon to attribute any fraud or intentional wrong to the officers forming the election board, but simply an error of judgment; this, indeed, was the only course of argument adopted by the counsel for the contestants. If

(Powers of the courts.)

they were mistaken, though honest in their own opinions, in establishing a rule which prevented legal voters from voting, and which might, if the votes had been received, have varied the returns, the court must now interfere. The acts of assembly give to this court a direct supervision over the conduct of the officers who conducted the election, as it operated upon voters, by giving jurisdiction over cases "of undue elections and false returns," when, in legal and statutory form, brought under our cognisance. Act 2d July 1839, § 151, Purd. Dig. 300. If it appear that an erroneous rule was adopted, which did improperly keep otherwise legal voters, tendering their votes, from voting, or which, when made known as the decision of the board, prevented other voters, similarly situated, from offering their votes, it would be an undue election; more clearly, however, to be set aside by the court, if, under the evidence, it be rendered reasonably probable, that if such votes had been offered and received, the result of the election would have been different, or have been left in doubt.

We now find, upon considering the evidence, that such an erroneous rule was adopted and promulgated, and that the reverse of the rule, or rather the true rule, if allowed, might have produced a different state of the polls. In this respect, then, the election was *undue*, and the returns *false*, as an election of the citizens, though not intentionally so upon the part of the officers. The rule thus wrongfully adopted, was upon an alleged principle operating upon a large number of voters; in such a case, it cannot be considered necessary to prove that each individual so affected tendered his vote to the board and was refused, or how they would have voted, if admitted. If they were legal voters, they had the right, without the supervision of this court, or any other persons, to vote by ballot, and not to make their votes known to any one, unless they chose so to do. As a general rule, it affected a class, and it was not required that each one of that class should have his

(Powers of the courts.)

vote formally rejected; virtually, it was so, in all cases of the same kind, by the special decisions made.\*

A borough election is of a double character; at such an election the proper charter-officers are elected, and other officers of a more general nature, similar to the township officers found in other municipal divisions. This double election is sometimes held at two different times, when so required by the charter; but more generally, it is believed, as in the present one at Scranton, at the same time, and under the controlling direction of the same persons. Both these elections, or the double election, are public, and voted at by residents of the borough; but the charter-officers (otherwise the corporation officers) are to be elected by residents or corporators, who are qualified voters under the limitations of the charter; while the other more public officers, similar to township officers, are to be voted for by residents and voters qualified under the several laws relating to elections. For the qualifications of the former, the charter is to be looked to, for those of the latter class, the constitution and general laws of the state. Even an *alien* inhabitant, under some of the old charters, had the right to vote at a charter election, though he never could be a voter at the other election. *Stewart v. Foster*, 2 Binn. 120. (See also, as to the construction of the act relating to boroughs, the case of the Borough of West Philadelphia, 5 W. & S. 281.)

Borough elections, by the 14th and 15th sections of the

\* This so equitable a rule of election law, the court of common pleas of Philadelphia utterly ignored, on the trial of the contested elections of 1868; at that election, Mr. Justice Read having published, on the eve of the election, an extra-judicial opinion, that all the naturalizations in the court of *nisi prius* were illegal, under the acts of congress, the republican election officers made it a pretext for rejecting the votes of all naturalized citizens holding certificates of naturalization from that court, and the result was, that thousands of legal voters were disfranchised by this erroneous rule adopted by the election officers, and the result was entirely changed. The illegality of this ruling was subsequently established by the decision of that very court; and yet, they sustained their own party friends, who held the returns under it.

(Powers of the courts.)

act of 1851 (Purd. Dig. 119), are (unless otherwise ordered by the charter, which is not the case in Scranton) to be held at the time and place appointed by law for the election of inspectors, and in accordance with and subject to all the provisions of the law regulating township elections, *so far as applicable*; again, by the 3d section of the act of 1839 (Purd. Dig. 370), the time and place for electing inspectors, is fixed at the time, &c., for electing constables, which is at the same time, &c., with other township officers. The time and place, then, of holding the Scranton election, was right, for the officers of both characters. How far are the laws regulating township elections further applicable to such a borough election? Just so far, in our opinion, as, by law, officers similar to township officers and known by name to be such, are to be elected. Township electors are to elect township officers, and the law directing such an election applies to *them*, and in the case of a borough, it applies to *similar officers*. Though the term "borough election" is used in the statute, yet, regarding it as of a double character, as we have heretofore explained, there is no difficulty in recognising the distinction we now take.

Who then are *township* officers, within the meaning of the statute? They are named in the 117th and following sections of the act of 15th April 1834 (Purd. Dig. 962-6), together with, so far as Luzerne county is concerned, the act of 1842 (Pamph. Laws 47), allowing the election of overseers of the poor. Who are the *similar* officers of a borough? They are found (called by the same names), in the borough act of 1851, § 14 (Purd. Dig. 119), to wit, assessors and assistants, auditors, constables and overseers of the poor; the office of a supervisor is not known in a borough. We now, then, find certain officers both in townships and boroughs, bearing the same names, and fulfilling similar duties, and similar in all respects, whose elections are to be regulated by the same laws, and necessarily, therefore, subject to the same incidents. As to charter-officers, however, the case is different; there are



(Powers of the courts.)

no similar officers in townships, and the election law is no further applicable to them, than as to time and place, and the official holding of the election. Neither are the inspectors and judge of an election, township officers, nor subject to any incidents connected with their election, other than those applicable to borough charter-officers; a township officer, as the law now stands, being a well-known and definite term, applicable to particular named officers and no others. See *Leib v. Commonwealth*, 9 Watts 219-20. The subject is somewhat confused, and to be understood only by comparing together the several acts of assembly; while we do not profess to give in this opinion all our reasons for the conclusion at which we arrive, or, in detail, a comparison of the acts, we more briefly state the result which has been reached on consideration of the whole question. We think it simplifies the proceedings connected with this two-faced or double election, and secures to every one the rights promised to him by the constitution and general laws of the state, in connection with all other citizens; while at the same time it makes him subject to borough regulations and limitations, which he agreed to assume and submit to, by voluntarily becoming a corporator and citizen of a particular borough. It may be, perhaps, proper to assume, that the decision of the supreme court in *Brunott v. McKee*, 6 W. & S. 514, that a constable is not, for certain purposes, to be regarded as strictly a township officer alone, does not affect the present argument.

One general system of public elections is established by the act of 2d July 1839, modified in some few particulars by later statutes. It is enough for us now to say, that this act covers and controls, so far as material to any question here, all public officers, state, county and township; the general class of electors for all such officers is named, their qualifications being the same. The 63d section of the same act, adopting the words of the constitution, fixes the qualifications of a voter, and refers, by express words,

(Powers of the courts.)

“any election as aforesaid,” to the previously-appointed elections for any and all such officers, including inspectors, &c., and township officers. The system is uniform, is based on the constitution, and no new act of the legislature can change such a provision, so as to affect the constitutional qualification, either by diminishing or adding to it any prerequisite. The right to enjoy and exercise the privilege of voting for public officers, upon certain stipulated terms, is secured to the people by the constitution, and it cannot be supposed, that the legislature ever intended, if they could so legally have done, to make the qualification for voters, for similar public officers, different in different places. We cannot, then, come to any other conclusion, but that, as to inspectors, &c., and officers who, under the act of 1834 and its supplements, are called “township officers,” and also are to be voted for by citizens of a borough, as public officers, under the same general regulations and authority, the true qualifications of a voter are the constitutional and statutory provisions of the act of 1839, before referred to; and that the further prerequisite of residence for six months, and payment of a borough tax, under the act of 1851, cannot be required in a voter, offering to vote for such officers. Such a limitation, however, is entirely proper and lawful, in deciding upon the qualification of a voter, offering to vote for charter or corporate officers of a borough.

The qualification of electors for school directors, under the original act of 1st April 1834, P. L. 170 (and never since, in this particular, changed), evidently refers to the same prerequisites, as those of electors for constables and township officers. Such an election is regarded as a public election by the people throughout the state, voting in their several districts, for a common purpose and object, and therefore, to be governed by similar rules. Indeed, a borough may now, under certain circumstances, be connected with a township, as one school-district, and in such a case, it would be a strange anomaly, if, in voting for the

(Powers of the courts.)

same candidates for the same, or but one office, there could be a different rule of qualification for the voters living within or without the bounds of the borough.

This court has nothing to do with the election of "Trustees of Proprietors' School Fund;" their election cannot be tested in this mode, and we know nothing of the qualification of electors.

We think, then, that under the 14th and 15th sections of the act of 1851, above cited, the provisions with regard to township elections, so far apply to those of similar officers under a borough, that as a necessary incident issuing therefrom, this court has a right to inquire as to the validity of the election of borough officers, similar to township officers, as we have already referred to them. As, then, under the evidence in the case, it is clear, that the qualification of the prepayment of a borough tax was required from any admitted voters for such officers, others being rejected for want of this qualification, such rule being wrongly laid down by the board, there is reasonable probability that it may have affected the result of the election; and we feel called upon, therefore, to pronounce the election, for this reason, if for no other, an undue election; and as to assessors and assistants, constable (heretofore disposed of), overseers of the poor and school directors, such election is set aside.

We do not find that any jurisdiction is, by law, given to this court, to decide upon the elections of inspectors and judges. The 153d section of the act of 1839 (Purd. Dig. 392) gives jurisdiction to the court to hear and determine, not all cases of contests of elections in townships, but only those in which the election of county or township officers is contested. As clearly appears, from what we have heretofore stated, inspectors and judges are not *such officers* within the meaning of the statute, as the persons intended are specially named in the act of 1834, before cited. The election of inspectors is required to be at the same time and place with that of constables, but no pro-

(Powers of the courts.)

vision is made for a contest. By the act of 21st June 1839 (Purd. Dig. 589), elections of justices of the peace are directed to be held at the same time and place as elections for constables; yet, here the legislature felt that, in order to give a court supervision over the election, it was necessary expressly to provide for a contest by the 3d section of the same act. So, with regard to school directors, though the election is held at the same time and place, special authority to contest the election was given by the 5th section of the act of 1849 (P. L. 442); and again repeated, upon a change of the law, by the 6th section of the act of 1854.\* Purd. Dig. 168. We consider, then, that we have nothing to do with the inspectors and judges returned as elected. It follows, too, from the conclusions we have heretofore reached and stated, that the mere charter-officers, the burgess and council, are not within the scope of the present complaint in the quarter sessions;† their right to hold office can only be investigated upon a *quo warranto* in the common pleas. It should be remembered, too, that the ground of objection to the election of officers, which is now sustained, would be, or rather is, no objection to the election of charter-officers.

The question is raised before us, whether the whole of the 5th section of the act of 1834, relating to borough elections, published, as in force, in Purd. Dig. 118, is not, in fact, repealed by the 34th section of the act of 3d April 1851. The words of this section are, "that all general laws of the commonwealth, inconsistent herewith, are hereby repealed." The section thus claimed to be abrogated is a very comprehensive one, and as to the greater part of its provisions, is certainly repealed by other acts,

\* Under this act, the court has jurisdiction on the petition of parties *contesting* the election of a school director; but where there is an election to fill a supposed vacancy, it has no jurisdiction to decide upon the validity of such election. *Collins's Case*, 2 Grant 214.

† The jurisdiction was extended to contested elections of borough and ward officers, and of judges and inspectors of elections, in Northampton and Lehigh counties, by act of 9th March 1871. P. L. 201.

(Powers of the courts.)

inconsistent with it and changing it in such particulars; still, we believe it is partially in force, and that, in case of a vacancy in charter-offices named in the section, a new election should be held under and in conformity with it.

Our reasons for this conclusion are, briefly, that in case of any such vacancy, there is no other authority given in the act of 1851 or elsewhere, to supply it; the court certainly cannot do it, and the people, without this authority or some other more specially provided in the charter, will be equally without power. We do not consider it the fair intent and legitimate meaning of the 19th section of the act of 1851 (Purd. Dig. 119), that "officers are to serve until others are duly elected and qualified," that, in case of difficulty or fatal irregularity in an election, it contemplates the necessary continuance of the old charter-officers, for one whole year, or until the next annual election; the true meaning would seem to be, that they should continue in office until an apparent vacancy be supplied; looking for a speedy filling of that vacancy, as in other elective offices generally. If this be not correct, then, if the officers of a charter-election, or the constable, whose duty it is to give notice of an election according to law, choose to misconduct themselves for the very purpose of keeping an existing council in office, there would be no way of preventing this result, for one year at any rate, and perhaps longer. It is contrary to the spirit of our institutions, that officers, elected for a limited time, should be enabled, by the misconduct, perhaps, of some of their own friends, to retain office for a double period, contrary to the clear and manifest will of the people; yet such may be the result, if there be no mode of filling a vacancy, either by appointment or new election. Other cases of difficulty may arise, where there is misconduct in no one, and yet a vacancy. Suppose the full number of councilmen are not elected, or, if elected, that one or more of them die, after the election and return, but before being qualified, there will then be

(Powers of the courts.)

a vacancy; what particular members of the old council will continue in office to supply the want? all have an equal right to claim it, and who will decide between them? The absolute necessity of providing for such cases, would induce us to hesitate in pronouncing this section of the act of 1834 entirely repealed, even if the alleged repealing clause of the late act were more broad in its terms than it is shown to be; on the other hand, when, as this repealing clause is really worded, we find nothing relating to this point in the new act, inconsistent with the provisions of the older one, but in entire harmony with it, from the fact that the new act provides for no such cases, why should we consider it repealed? The argument of the court, in their opinion in *Street v. Commonwealth*, 6 W. & S. 212, is referred to, though not analogous strictly in everything, except its general spirit.

We should not have deemed it necessary to give this opinion, in reference to vacancies in charter-offices, though we were earnestly asked by one of the counsel, in his argument of this case, to do so, were it not that, so far as this same section applies to constables and overseers, we do think it is changed by the act of 1851; it became necessary, therefore, so far to qualify our opinion, as to show how far alone, we think it is repealed. The section of the act, heretofore cited, placing the election of the constables and overseers under the same rules as similar township officers, is inconsistent with the provision of the earlier borough act of 1834, if they refer to the same kind of constable. It may also be observed, that when this act of 1st April 1834, was passed, the bill, which subsequently, on the 15th April of the same year, became a law, abolishing the office of overseer in the townships, had been reported by the commissioners, printed, and its passage fully anticipated. It being thereby intended, afterwards, to dispense with the township office of overseer, it may have induced the legislature, as there were no supervisors in boroughs to take upon them their duties and the charge of the poor,

(Powers of the courts.)

to name overseers as borough officers, special in their character, and their vacancy to be supplied in the manner then provided. When, however, the office was renewed in the townships, and the old general system of the control of the poor and the pauper districts resumed, before the act of 1851, it seemed but reasonable to put similar officers upon the same footing, both in boroughs and townships, giving to the courts, in case of a vacancy, the incidental right, in both cases, of appointment.

The constable named in the act of 1834, called in the 5th section "town constable," and in the 6th section, "high constable," seems to be a different officer from the one mentioned in the act of 1851, by name; the appointment of high constable depends upon the provisions in the charter.

The testimony of those who are not petitioners, is sufficient to establish the facts upon which this opinion is founded; still, I am inclined to think, for the reasons given in *Kneass's Case*, 2 Pars. 590 (ante 373), and 1 Phila. 159, that their interest, if any, was so indirect, remote and uncertain, that it should go to credit rather than competency.

The judgment of the court is, as follows: The evidence having established an undue election for the following named officers of the borough of Scranton, the election for assessor and assistant-assessor is set aside, and the county commissioners will fill the vacancies; the election of auditors and overseers of the poor is set aside, and the court will make appointments to fill the vacancies; the election for school directors is set aside, and a new election ordered under the provisions of the sixth section of the act of 1834, of which the proper officer will give two weeks' notice, according to law; the complaint against the returned election of burgess, five councilmen, one judge and two inspectors of election, and three Trustees of Proprietors' School Fund, is dismissed, this court having no jurisdiction in the premises; costs to be paid out of the borough treasury.

(Powers of the courts.)

The courts, in deciding cases of contested elections, act in a judicial capacity; they are not like a board of canvassers, but their duties are to examine into the existence of such specified frauds and irregularities as would nullify the result arrived at by the return judges. Kneass's Case, 2 Pars. 553. In *Mann v. Cassidy*, 1 Brewst. 25, Thompson, P. J., said, "the act of assembly which devolves on the court this most unpleasant jurisdiction, in addition to the authority vested in it as a judicial tribunal, clothes it with powers which, by the same act, are conferred on committees of the legislature. These include the power 'to decide not only on the validity of the contested election,' but also 'which of the candidates had the greatest number of legal votes.' This grant of power was necessary, to enable the court to act in the premises, as, without it, it would be difficult, in a proceeding where the investigation is to be made upon the representation merely of twenty citizens, with a simple notice of the time of hearing to the persons returned (which notice may be entirely disregarded), to proceed, by the exercise of any of the well-defined powers of a court of law, to decide upon the rights of the several parties interested as candidates. In this proceeding, there is no provision for bringing any opposite party into court; or, in case of neglect or refusal to appear, for taking a decree by default or confession. There is no answer required from any one to the petition presented; nor any rule or regulation to produce an issue. The simple process is, the presentation of the petition, on which the court is required to fix a time of hearing, with ten days' notice thereof to the 'person returned.' As it would be inconsistent with the other duties of the court, to inquire into every vague allegation which might be made as to the fairness of an election, it was early seen, that the court must, of necessity, adopt some rules to regulate election cases, as they do other cases, and that to bring such cases, as far as possible, within the ordinary rules of practice, would be most consistent with the duties required by law. Under these rules, the appearance of a party to oppose, constitutes him a litigant party; he is entitled to take every objection to the proceedings of the contestants, both as to matters of form and of substance, which may secure to him a fair and legal hearing; he has the right to require the court to decide, as a preliminary question, whether the petition filed presents such a case, as would, if established by evidence, affect his rights, and if it be found deficient in



## (Powers of the courts.)

substance, to order it to be quashed; or, if defective in parts, to direct such parts to be stricken out."

In the same case, the court ruled, that the powers conferred upon them, in contested elections, are to be exercised judicially; and in such cases, proceedings are to be regulated, as far as practicable, by the established rules of judicial procedure. That the petition must set forth, plainly and distinctly, facts which, if sustained by proof, would render it the duty of the court, to entirely vacate the election, or to declare that another person, and not the person returned, was duly elected to the office in question. That the court would strike from the petition all irrelevant or general allegations, which could not affect the merits of the case or the general result. And that a petition to set aside an election might be amended, and especially, where leave to amend was applied for, before any progress was made in the hearing of the cause.

An amendment to the petition must be verified in the same manner as the original petition; but it need not be sworn to by the same identical petitioners. *Mann v. Cassidy*, 1 Brewst. 11. It may be allowed to be filed *nunc pro tunc*. *Gibbons v. Sheppard*, 65 Penn. St. R. 35. But it must not introduce new matter. *Thompson v. Ewing*, 1 Brewst. 68, 97, 101. The court will not permit an amendment of the answer, during the progress of the hearing. *Mann v. Cassidy* (Report 386). Nor will they seal a bill of exceptions to a question of evidence. *Ibid.* 1 Brewst. 12; *People v. Smith*, 51 Ill. 177.

On a contested election, the court has no power to inquire into the legality of a previous election for election officers. *Mann v. Cassidy*, 1 Brewst. 11; *Commonwealth v. Smith*, 45 Penn. St. R. 59. And a court of quarter sessions, in judging of the validity of a township election, has no power to order another. *McDaniels' Case*, 3 Penn. L. J. 310.

## ALLENTOWN ELECTION.

In the Quarter Sessions of Lehigh County, Pennsylvania.

JUNE SESSIONS 1871.

(REPORTED 28 LEGAL INTELLIGENCER 229.)

[*Acquisition of domicil.*]

Residence, within the meaning of the constitution, as a legal qualification of an elector, is synonymous with domicil, and means the place of a person's permanent abode.

A student at college, who has a domicil of origin, and resides at the institution for the sole purpose of education, does not thereby acquire the right to vote in the district in which the college is located.

The election officers are not concluded by the oath of the person offering to vote, as to the question of domicil ; they have a right to determine the point from all the facts and circumstances of the case.

This was a proceeding to contest the election of George R. Roth and George Fry to the office of common councilmen of the Second ward of the city of Allentown. The facts are fully stated in the opinion of the court.

*Wright, Harvey* and *Stiles*, for the contestants.

*Wood* and *More*, for the respondents.

LONGAKER, P. J., delivered the opinion of the court. The question involved is, whether or not certain students of Muhlenberg college, who voted in the Second ward of this city, at the October election, were qualified electors. Their qualification is denied, upon the allegation that they had not obtained a residence within that ward, as prescribed by the constitution of this commonwealth. The constitutional provision is as follows: "in elections by the citizens, every white freeman of the age of twenty-one years, having resided in the state one year, and in the election district where he offers to vote, ten days imme-

(Acquisition of domicil.)

diately preceding such election, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the right of an elector:" "white freemen, between the ages of twenty-one and twenty-two, being citizens, and having a residence as aforesaid, shall be entitled to vote without the payment of taxes." What, then, is residence within the constitutional meaning? is it synonymous with domicil, or is it used in a more restricted signification?

The word residence occurs in several statutes, and has received judicial interpretation, but unfortunately, the constitutional signification of this word has never been judicially declared by the supreme court of this commonwealth. The statutory signification (in *Commonwealth v. Graham*, 51 Penn. St. R. 258, a case arising under the statute of limitation barring a criminal prosecution) is said to be, "to dwell permanently for any length of time—to have a settled abode." In *Commonwealth v. Jones*, 12 Penn. St. R. 371, a proceeding by writ of *quo warranto*, alleging that the defendant, when he was elected mayor of the city of Philadelphia, was a non-resident, by reason of exercising the office of president of Girard college, and in the discharge of the duties thereof, residing at the college, in the then county of Philadelphia, the office having been conferred by the city, it is said, by Chief Justice Gibson, "the doctrine seems to be, that if the office were irrevocably conferred for life, the law fixes the domicil at the place where the functions are to be performed, but that if it be temporary or revocable, the presumption is against a change." (Phillimore on Domicil 61-2.) "The residence of a federal officer in the District of Columbia was never thought to operate so as to forfeit his residence at his last domicil." 12 Penn. St. R. 371. In *Guier v. O'Daniel*, 1 Binn. 349 n., it is held, that a domicil may be defined, a residence at a particular place, accompanied with positive or presumptive proof of continuing it an un-

(Acquisition of domicil.)

limited time, and is the conclusion of law, on an extended view of facts and circumstances.

In the United States courts, the word residence has received frequent judicial construction. In *Cooper v. Galbraith*, 3 Wash. C. C. 546, it is held, that "residence and domicil are synonymous." In *United States v. The Penelope*, 2 Pet. Ad. 450, it is said, that "an inhabitant or resident is a person coming into a place with an intention to establish his domicil or permanent residence, and actually executing that intention, by taking a house or lodgings, opening a store or the like." In *White v. Brown*, 1 Wall., Jr., 217, it is held, that "in order to acquire a domicil of choice, the fact of residence must be coupled with an intention to abide an indefinite time, or to make the place a home."

An intention to remain permanently or for some indefinite time, is essential to make the place of a party's residence his domicil. *State v. Daniels*, 44 N. H. 383. Absence from one's domicil for a temporary purpose with an *animus revertendi* will not change a domicil. *Risewick v. Davis*, 19 Md. 82. A student at a college does not change his domicil by his occasional residence at the college. *Granby v. Amherst*, 7 Mass. 1. The intention to abandon a domicil, and an actual residence at another place, if not accompanied with an intention of remaining there permanently, or at least for an indefinite time, will not produce a change of domicil. *Jennison v. Hapgood*, 10 Pick. 77. In *Roosevelt v. Kellogg*, 20 Johns. 208, where there was a plea of discharge under the insolvent act, it was held, that the words "resident and inhabitant were synonymous." 2 Kent's Com. 431, n. (citing also 8 Wend. 140; 4 Wend. 603), declares that the words "inhabitaney and residence mean a fixed and permanent abode, a dwelling-house for the time being, as contradistinguished from a mere temporary locality of existence." In *Frost v. Brisbin*, 19 Wend. 21, it is said, "to constitute residence within the legal meaning of the term, there must be a settled or fixed abode, an

## (Acquisition of domicil.)

intention to remain permanently, at least for a time, for business or other purposes." It will thus be seen that the authorities in this state, in the United States courts, and in the courts of our sister states, preponderate almost unanimously in favor of the construction, that residence is synonymous with domicil.

It is true, that only one of the many authorities cited involved directly the residence of a student (*Granby v. Amherst*, 7 Mass. 1); and that, not upon the privilege of voting, but upon the question of a pauper's settlement. Some of these cases involved the distribution of a decedent's estate, some the seizure of property under the attachment laws, others the right of discharge from arrest for the non-payment of debts, and one the privilege to hold and exercise the office of mayor of the city of Philadelphia. Questions involving personal liberty, the right to office, and the seizure and distribution of property, are quite as important as, if not paramount to, the question which determines the residence of an elector.

It is quite remarkable, that of all the adjudicated cases cited by the learned counsel on either side, but one has been found which involved the right of a student to vote, while residing in the district for the purpose of pursuing his studies, and that is the case of *Putnam v. Johnson*, 10 Mass. 488, decided in 1813. That case decides, "that Israel W. Putnam, a student at the theological institution of Andover, being of age, and otherwise qualified according to the constitution, and being also emancipated from his father's family, is entitled to vote." An examination of this case shows that Putnam was twenty-five years old, that he graduated at Dartmouth College in 1809, that he then went to Salem and resided there as a student-at-law until April 1813, that while at Salem in 1810 and 1811, he was assessed, paid taxes and voted, that since his graduation he had supported himself, acquired property and was separated from his father's family, that in April 1813, he changed his intention, by abandoning the law and going

(Acquisition of domicil.)

to the Andover theological seminary to prepare himself for the ministry. This case was decided under the following clause in the constitution of Massachusetts: "To remove all doubt concerning the word *inhabitant* in this constitution, every person shall be considered as an inhabitant, for the purpose of electing or being elected into any office or place within this state, in that town, district or plantation *where he dwelleth or hath his home.*" Some time prior to 1844, the constitution of Massachusetts was amended, making the elector's qualification an act of residence, and in that year, upon an address from the house of representatives (5 Met. 689), inquiring as to the right of a person to vote who resided at a public institution for the sole purpose of obtaining an education, the justices of the supreme court said: "'Inhabitant,' mentioned in the original constitution, and, 'one who has resided in the district,' as expressed in the amendment, designate the same person, and both of these expressions, as used in the constitution and amendment, are equivalent to the familiar term domicil, and therefore the right of voting is confined to the place where he has his domicil, his home or place of abode." "His residence will not give him the right to vote at the college, if he has a domicil elsewhere." Chase *v. Miller*, 41 Penn. St. R. 420 (as a *dictum*), declares that "the primary signification of the word residence, as used in the constitution, is the same as domicil, a word which means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights."

A full review of these decisions leads to the conclusion, that the constitutional qualification of the elector, as regards his residence, means domicil. This construction is highly favored by the context of the constitutional clause, wherein it prescribes not only residence, but assessment and the payment of taxes. As regards these latter qualifications, the constitution is to be primarily interpreted *in pari materia* with the assessment and tax laws

## (Acquisition of domicil.)

in force at the time of its adoption; and secondly, *pari passu* with those now in force, because the constitution plainly permits the legislature to prescribe, at all times, the subjects and rates of taxation. Assessment, at the adoption of the constitution of 1838, and as the statutes now exist, requires the assessor to take an account of the names and surnames of all the taxable inhabitants within their respective wards, townships and districts, and of the real and personal estate of the taxables. The locality of personal property for taxation follows the domicil of the taxable.

Domicil is defined to be a fixed dwelling, or a permanent abode, with a present intention to remain for an indefinite period of time, and is usually the place where a person is engaged in some business, profession or occupation, from the pursuit of which is ordinarily derived the means of support for himself, and where he exercises his civil and political rights. Civil and political rights, on the one hand, confer the privilege of voting, and on the other, impose the obligation of paying taxes, and enjoin the performance of municipal duties. By a residence in a particular district, so as to acquire a domicil therein, every taxable citizen becomes liable to assessment and taxation, liable to assume the offices of constable or assessor, to serve as a juror, and formerly to be enrolled amongst and to be mustered with the militia; in short, he assumes and becomes liable to perform all the municipal duties which commonly devolve upon the inhabitants of that district. The mere act, therefore, of residing in a place for a specific purpose and for a definite time, with no permanent intention of remaining, of making it the seat of property and of incurring a full and unequivocal assumption of municipal duties, does not constitute a residence, within the constitutional meaning of that word. The words "having resided in the state one year, and in the election district ten days immediately preceding the elec-

(Acquisition of domicil.)

tion," as found in the constitution, therefore, are to be held as synonymous with *having a domicil* therein.

Which one of those students who have exercised the privilege of voting, can say, or does say in his testimony, that he came to the Muhlenberg college with the intention of making it his permanent home, his domicil? or that he is here even with a present intention of becoming a resident of this city, so as to be subject to taxation by making it the seat of all his personal property, and of taking upon himself a full liability to perform all the municipal duties which devolve upon the permanent residents or inhabitants of this city? Which one was assessed by the assessor, when the permanent citizens were assessed? When did it ever occur to the assessor, while making the usual spring assessments, or to the students themselves, that they were residents of this city, so as to be liable in their persons and personal estates, to assessment and taxation for state, county, school and city purposes? Who, among them, is here with a present intention to assume the office of constable or assessor, to act as a juror, or to make this city the seat of his property? These and the like inquiries are very pertinent, because the rule of law has been, repeatedly, if not universally, declared to be, that a person's domicil is to be determined by his residence at a particular place with positive or presumptive proof of continuing it an unlimited time, and is the conclusion of law on an extended view of facts and circumstances. *Guier v. O'Daniel*, 1 Binn. 352 n.; *United States v. The Penelope*, 2 Pet. Ad. 450; 19 Wend. 11; *Moore v. Darrall*, 4 Hagg. Eccl. 346; Code Civil, Art. 103; *Tanner v. King*, 11 La. 175; 5 Met. 587; *Somerville v. Somerville*, 5 Vesey, Jr. 750; *Casey's Case*, 1 Ash. 126.

The determination of a voter's residence, is therefore a question of fact, and in most cases, one of easy solution. Where the voter is a married man and has been residing in the district ten days or more before the election, with his family, following some profession or occupation, with a



## (Acquisition of domicil.)

present intention to make it his home and to remain for an indefinite time, he will have acquired a residence within the meaning of the constitution. Unmarried men who have fully severed the parental relation and who have entered the world to labor for themselves, usually acquire a residence in the district where they are employed, if the election officers be satisfied they are honestly there pursuing their employment, with no fixed residence elsewhere, and that they have not come into the district as "colonizers," that is, for the mere purpose of voting, and going elsewhere as soon as the election has been held. The too frequent practice of importing voters into a district where population is centralized, ten days or more before the election, apparently to meet this requirement of the constitution, for the sole purpose of controlling the election of that district, is a fraud upon its citizens, and whenever the election officers are clearly satisfied that such is the intention of the elector, it becomes their plain duty and right to reject his vote. The mere fact, therefore, that the elector is willing to swear, and does swear, that he considers the district his home, is not sufficient to entitle him to vote, if the facts and circumstances satisfy the election officers that his permanent home or domicil is elsewhere. A person can have but one domicil, but he may have a residence for a specific time and purpose apart from his domicil.

Very few, if any, students while residing at the college, acquire a new home or change of domicil, and they are, therefore, not entitled to vote. In the early history of our colleges, while the true meaning of the state constitution was fresh in the minds of the framers of that instrument, it was never pretended, that the student acquired a residence at the college so as to become a qualified elector, to be liable to taxation and to the performance of municipal duties. In those days, when the purity and freedom of elections prevailed, the parental home or the locality from whence the student came, was universally accepted as the

(Acquisition of domicil.)

district in which he was entitled to vote. In the commonwealth of Massachusetts, where some of the earliest colleges were founded, in the case of *Putnam v. Johnson*, 10 Mass. 495, which was decided in 1813, it is said, "that under-graduates of an university never yet had claimed a right to vote for senators, in the town where the university is situated." Such, I apprehend, was the prevailing opinion of the citizens, as well as of the students, up to a recent period, in this state.

To determine the right of a student to vote, it is said in 5 Met. 589, that "where a student has his domicil of origin at a place other than the town where the institution of learning is situated, and he goes there for the sole purpose of obtaining an education, it would not, of itself, give him the right to vote, because it would not necessarily change his domicil, but in such case his right to vote in that place would depend upon all the circumstances connected with such residence. If he has a father living, if he still remains a member of his father's family, if he returns to pass his vacations; if he is maintained and supported by his father; these are all circumstances repelling the presumption of a change of domicil; so, if he has no father living, if he has a mother or other connections with whom he has before been accustomed to reside, and to whose family he returns in vacations, if he describes himself of such place, and otherwise manifests his intent to continue his domicil there, these are all circumstances tending to prove his domicil unchanged."

A careful examination of the testimony leads to the conclusion that none of these students, whose votes are contested, were qualified electors at the last October election. The names of all appear upon the extra-assessment, while most of them were residing at the college when the annual assessment was taken, and none of them swear that they came here with any other intention than of obtaining a collegiate education, and of going elsewhere after their graduation; all are registered in the matriculation book

## (Acquisition of domicil.)

as belonging to the homes from whence they came; some are under the pupilage of their parents, receiving all their support from them, and in no sense whatever are they emancipated from the parental domicil; whilst others, partly support themselves, and go elsewhere or usually to their homes during the vacations, but they are here with no intent to remain an indefinite time or to acquire a new domicil. Students being here for the sole purpose of being educated, and not coming *animo manendi*, but intending to go elsewhere as soon as graduation takes place, do not fall within the same category with unmarried men who seek employment from point to point, as opportunity offers. The student is in a preparatory condition, in a state of tutelage, and non-productive, not yet able or willing to enter the world to engage in business, or in the productive pursuits of life, nor fully prepared to assume civil and political rights and duties. The unmarried man who has severed the parental relation, becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy political privileges, but also to assume and to discharge political and civil duties.

This ruling imposes no greater hardship upon the student than is visited upon many others engaged in the various pursuits of life at points away from their domicils. In *Chase v. Miller* (ante 234), it is said, that four of the supreme judges, found themselves holding a term of court at Pittsburgh during each presidential election, and although they were there more than ten days before the holding of the election, it could not be pretended that that place could become their residence so as to entitle them to vote. Again, it is known as part of our history, that members of the cabinet, senators and members of congress, heads of departments and clerks, who reside at Washington almost the entire year (and many of them with their families), and are there for an indefinite term of years, return at each annual election to their native

(Acquisition of domicil.)

states, and at their proper domicils exercise the privilege of electors. The student does not become disfranchised, but like all others who are engaged in temporary pursuits away from home, he is compelled to go to his proper domicil to exercise the right of suffrage.

By the official returns the votes stand as follows: George B. Roth 223, George Fry 218, William Kichline 224, John Nonnemacher 208, George T. Young 192, Eli J. Saeger 211. Of the votes now rejected twelve were cast for George B. Roth, George Fry and William Kichline, and three for John Nonnemacher, George T. Young and Eli J. Saeger; deducting the twelve and three from the candidates respectively, the vote will stand thus: George B. Roth 211, George Fry 206, William Kichline 212, John Nonnemacher 205, George T. Young 189, Eli J. Saeger 208. Eli J. Saeger is thus elected over George Fry, to whom a certificate of election has been issued by the judges of the election.

And now, to wit, 5th June 1871, it is ordered, considered, adjudged and decreed that a certificate of election be forthwith issued by the clerk of the court of quarter sessions to Eli J. Saeger, as a member of the common council in and for the city of Allentown, and that the certificate heretofore issued by the election officers to George Fry, be and the same is hereby declared to be null and void.

---

In Pennsylvania, it is provided by statute, that if an elector claim to have resided within the state for one year or more, his own oath shall be sufficient proof thereof. *Purd. Dig.* 376. But under this law, it was ruled by the court of common pleas of Philadelphia, on the 3d November 1848, that although the election officers are concluded by the answers of the person offering to vote, yet, they have the clear right to obtain from him full answers on the question of his residence, and if the result of those answers proves that he has not a legal domicil within the district, they may reject his vote.

Domicil of choice is a conclusion of law from the fact of a man fixing

## (Acquisition of domicil.)

voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. *Haldane v. Eckford*, L. R., 8 Eq. 631; *Case v. Clarke*, 5 Mason 70. It is a settled principle of law, that no man shall be without a domicil; and to secure this end the law attributes to every individual, as soon as he is born, the domicil of his father, if legitimate, or of his mother, if illegitimate; domicil of choice is the creation of the party, when acquired, the domicil of origin is in abeyance, but not absolutely extinguished; for, so soon as a domicil of choice is abandoned, the domicil of origin revives, without any special intention on the part of the individual; thus, if, after having acquired a domicil of choice, a man abandon it and travel in search of another domicil of choice, the domicil of origin comes instantly into action, and continues until a second domicil has been acquired. *Udny v. Udny*, L. R., 1 H. L. Sc. 441; s. c. 4 Am. L. Rev. 678; *Story's Conflict of Laws*, § 48. And see *Rabaud v. D'Wolf*, 1 Paine 587-8. *Ex parte Wiggin*, 1 Bank. Reg. 90.

The principle of this case has recently been affirmed in Michigan, under the following state of facts: in the early part of the civil war, Frank Hodges, a resident of the town of Vergennes, enlisted in the federal army, and having been disabled by the loss of an arm, was appointed to a clerkship in the interior department at Washington; in October 1870, he returned to Vergennes, for the purpose of being registered as an elector, but was denied the privilege of registry, on the ground of non-residence. In a suit for damages against the registering officers, in the circuit court of Kent county, at Grand Rapids, it was held by Hoyt, J., that Hodges had not lost his domicil at Vergennes, and that he was entitled to vote in that town. Ledger, 31st July 1871. And see *Maddox v. State*, 32 Ind. 111, where a similar question was determined in Indiana.

## PEOPLE v. HOLDEN.

In the Supreme Court of California.

APRIL TERM 1865.

(REPORTED 28 CALIFORNIA 123.)

[*Purging the polls.*]

The statutory remedy given to contest an election, does not oust the jurisdiction on information in the nature of a *quo warranto*.

The list of ballots, returned with the poll-list and tally-paper, is better evidence of the number of votes cast, and for whom, than the tally-list made from them by the election officers.

If an elector vote twice at the same election, his second vote must be excluded in the count.

An elector can only vote at his place of domicile; the thirty days' residence required, is to be computed by excluding the day of election.

A ballot which contains the name of the person voted for, and the office, two or more times, is to be counted as one vote; it is not looked upon as two or more tickets folded together.

An elector may acquire a new domicile, so as to entitle him to vote, while in the military service of the United States, by an actual intention to make such place his future residence.

Appeal from the District Court, seventh judicial district, Mendocino county. The relator and the defendant were candidates for the office of county judge, at the judicial election held in the autumn of 1863. The defendant was declared duly elected by the board of canvassers, and was commissioned by the governor; whereupon the attorney-general filed this information in the nature of a *quo warranto*, charging the defendant with having intruded into, usurped and unlawfully exercised the said office. During the progress of the cause, certain stipulations, in relation to the taking of testimony, were entered into between the counsel for the relator and defendant, which are noticed in the opinion. The court below gave judgment for the relator, from which the defendant appealed.

*Bennett, and Cook & Clarke*, for the appellant.

*Cadwalader*, for the appellee.

(Purging the polls.)

SANDERSON, C. J., delivered the opinion of the court. It is first claimed by the appellant, that the district court had no jurisdiction in the premises, and that the only remedy, in cases like the present, is, under the statute which prescribes the mode and manner of contesting elections. Wood's Dig. 380, § 51. No proposition could be more untenable. It is true, that the act providing the mode of contesting elections, confers upon any elector of the proper county, the right to contest, at his option, the election of any person who has been declared duly elected to a public office, to be exercised in and for such county; but this grant of power to the elector, can in no way impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom, if it be made to appear that he is a usurper, having no legal right thereto. The two remedies are distinct, the one belonging to the elector in his individual capacity, as a power granted, and the other to the people, in the right of their sovereignty. Title to office comes from the will of the people, as expressed through the ballot-box, and they have a prerogative right to enforce their will, when it has been so expressed, by excluding usurpers and putting in power such as have been chosen by themselves; to that end, they have authorized an action to be brought in the name of the attorney-general, either upon his own suggestion or upon the complaint of a private party, against any person who usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. It matters not, upon what number of individual persons a right, analogous in its results when exercised, may have been bestowed, for the power in question, none the less, remains in the people in their sovereign capacity; it has been shared with the elector, but not parted with altogether. Substantially the same point

(Purging the polls.)

was made in the case of *People v. Jones*, 20 Cal. 50, without success.

It is next claimed, that it is nowhere shown by the record, that all the election returns of the various precincts were given in evidence, and hence, it is argued, that neither the court below nor this court can determine which candidate received the most votes. It may be true, as claimed, that the record does not state, in so many words, that all the returns were given in evidence, yet it is apparent, from a comparison of the allegations of the complaint (not controverted), as to the number of votes cast, with the number as shown by the returns contained in the record, that such was the case; a formal statement that they were all introduced, is not indispensable; if it appear, in any manner, that such was the fact, it is sufficient; and we are satisfied, from an examination of the record, that all the returns were before the court. Thus, it is stated in the complaint, that according to the count of the board of canvassers, the relator received 488 votes and the defendant 530, which is not denied in the answer; it is also stated in the complaint, and not denied in the answer, that the returns from Noyo precinct, which show upon their face, 48 votes for the relator and 10 for the defendant, were rejected by the board of canvassers; these votes being added to the estimate of the board, make the entire vote of the county stand, for the relator 536 and for the defendant 540; which is the exact vote as shown by the returns contained in the record. It is manifest, therefore, that all the returns were given in evidence, and that they are now before us.

Upon the face of the returns, as already stated, the defendant received 540 and the relator 536 votes, giving a majority of four to the defendant. Upon the trial, the court found that the defendant received 535 votes and no more, and the relator 537, which was, subsequently, at the hearing of the motion for a new trial, reduced to 536, giving the relator one majority. It is alleged on the part



(Purging the polls.)

of the appellant, that the court erred in thus deducting from Holden's vote.

Two of these five votes, so taken from Holden by the court, were deducted from the returns from Sanel precinct, which shows 31 votes for Holden. The ballots at that precinct were introduced in evidence (having been obtained from the clerk's office, where they are required to be kept, at least six months, by the clerk; Stat. 1863, p. 354, § 35), from which it appeared, that 31 democratic tickets were polled at that precinct; Holden's name was upon all of these tickets, except two, from which, as appears on inspection, his name had been torn off. Whether his name was torn off from these ballots, before they were cast by the electors, *or afterwards*, does not appear; upon that question no evidence was offered by either side, and no explanation attempted; thus, the question as to the number of votes received by Holden, at the precinct in question, had to be determined upon the evidence afforded by the certified returns on the one hand, and the ballots on the other. The court below held that the ballots were the most reliable evidence, and we are of opinion, that its conclusion was not erroneous.\*

Prior to 1863, there was no rule of law requiring the preservation of ballots cast at an election, for any purpose; on the contrary, the inspector of elections was required to destroy them, after the count and completion of the returns. Wood's Dig. p. 378, § 35. But in 1863, the law was amended, so as to require the inspector to string the ballots on a cord or thread, and return them with the poll-list and tally-paper to the county-clerk, to be kept by him for at least six months. Stat. 1863, p. 354, § 35. And

\* Here was a question of presumption against presumption; a presumption that the official returns were correct, on the one hand, and a presumption that the ballots had not been tampered with, on the other; by whatever technical reasoning, the court may sustain its position, no sane man, acquainted with "the ways that are dark, and the tricks that are vain," of professional politicians, will hesitate at coming to an opposite conclusion. Mr. Holden was, evidently, *counted out*.

(Purging the polls.)

it was further enacted, that any person might appear before the board of canvassers, on the day appointed for opening the returns, and demand a recount of the ballots, if he had any reason to believe that they had not been correctly counted by the officers of the election. The legislature could have had no other design in thus providing for the preservation of the ballots, than to make them evidence of their own contents, and a test of the correctness of the returns made up from them by the officers of the election. They are, in fact, made a part of the returns, for, it is expressly provided, that they shall be sealed up with the poll-list and tally-paper, with the certificates of the officers attached, and endorsed "election returns." Thus, they are recognised by the law, not only as a part of the election returns, and therefore, evidence of what transpired at the election, but as evidence of a higher and more satisfactory grade than the tally-paper.

Intrinsically considered, it must be conceded by all, that the ballots themselves are more reliable, and therefore, better evidence than a mere summary made from them; into the latter, errors may find their way, but with the former, this cannot happen. The relation between the two is, at least, that of primary and secondary evidence. This we do not understand the learned counsel as controverting, but he insists, that the use of the ballots as evidence is limited to a test of the correctness of the tally-paper, on the day appointed for the board of canvassers to open the returns, and that, on that day, they become and thereafter remain *functus officio*. That such was the intent of the legislature, we cannot admit; in no event, can the board of canvassers postpone the opening of the returns, beyond the second Monday after the election. Stat. 1861, p. 529, § 38. If, at that time, it was intended that the ballots should become *functus officio*, and thereafter cease to be a part of the official returns of the election, why provide that they should be preserved and kept by the clerk for at least six months? Why not direct that they should

(Purging the polls.)

be destroyed by the board of canvassers, as was done by the inspector, under the law as it stood prior to the amendment of 1863? In the same section requiring the ballots to be preserved, we find also a provision requiring the inspector to retain and preserve, for at least six months, a poll-list and tally-paper with the certificates of the officers attached. This provision was part of the law, prior to the amendment of 1863, requiring the ballots to be preserved, and could have had no other object than to guard against the loss or fraudulent interference with those sent to the clerk's office, and to furnish additional evidence of what transpired at the election. It is, therefore, manifest, that the amendment of 1863, requiring the preservation of the ballots, had a like object, and was enacted for the purpose of further assurance.

Being, as we hold, competent, it is clear, that the ballots are primary evidence, and therefore, better evidence of the number of votes cast, and for whom, than the tally-list made from them by the officers of the election. We must presume, that the officers of the election honestly performed their duty in the premises; that they did not mutilate any of the ballots, but on the contrary, strung them, in the condition in which they were found in the ballot-box, on a thread, and sent them, in that condition, to the clerk's office; the same presumption exists in relation to their custody by the clerk. In other words, in the absence of any evidence showing that the ballots in question were mutilated subsequently to their being deposited in the ballot-box, we are bound to presume, that they were in the same condition, when produced on the trial, from the proper office and by the proper officer, in which they were when deposited in the ballot-box; any subsequent alteration or mutilation, by any one entrusted by law with their custody, would be a public crime of great enormity (Wood's Dig. 385, § 105); and the commission of a crime cannot be presumed; *United States v. Amedy*, 11 Wheat. 408. If they were mutilated while in the clerk's

(Purging the polls.)

office, it was the duty of the defendant to make proof of that fact; not having been in the custody of the relator, but in that of the proper public functionary, *he* was not called upon to explain when and how the name of the defendant was torn off. The presumption, as we have already seen, was, that his name was torn off by the voters themselves; upon this presumption the relator could rely, and the labor of overthrowing it rested upon the defendant, who made no effort in that direction. There is no force in the argument that the ballots are liable to become mutilated, and ought, therefore, to be considered of less weight, as evidence, than the tally-list. The officers are required to string them on a cord or thread, and seal them up in a package, and deliver or cause them to be delivered to the county-clerk, whose duty it is, to safely keep them for at least six months; and the presumption is, that he has done so.

It is next claimed, that the court below erred in deducting from Holden's tally, the vote of J. M. Neil, cast in Calpella precinct. The court found that Neil voted twice for Holden, and it is sufficient to say, that, in our judgment, the finding is fully sustained by the evidence; according to the poll-list, the fourth vote cast, at Calpella precinct, was cast by J. M. Neil, and the 92d and last vote was also cast by J. M. Neil; that these two votes were cast by the same person, and not by two persons of the same name, there can be no doubt; Neil himself testified that, to the best of his recollection, he voted in the afternoon, near sundown, for the defendant, Holden; it further appears, from his own testimony and that of Mr. Cooley, one of the judges of the election, that on the evening of the election, he asked to have his name erased, claiming that he was intoxicated, and did not know, at the time, that he had voted before; there was also evidence to show, that there was no other person of that name, in that precinct, and none to the contrary. The first vote was legal,

(Purging the polls.)

the second was not, and the court did not err in excluding it.

We are also of opinion, that the finding of the court as to the evidence of W. R. Robinson, who voted for Holden, at Calpella precinct, was correct. He left Mendocino county with his family, in April 1863, and went to Sonoma county, with the declaration, in effect, that he was going there to reside; and from that time until and on the day of election, his family continued to reside in the latter county. The most that can be said on the side of the defendant, is, that the evidence as to Robinson's residence was conflicting; such being the case, this court will not disturb the finding; the fact of residence being found against him, Robinson's vote was properly rejected.

Nor did the court err in rejecting the vote of John Carroll, cast at Gualalla precinct. He came to the county on the 22d of September, and the election was held on the 21st of October following. In order to make thirty days, it would be necessary to count both of those days and the whole of each. The language of the constitution and of the statute is, that the voter must have resided in the county, thirty days next preceding the election; in our judgment, this language means, that he must have resided in the county, thirty days next preceding the election; but conceding that it means, next preceding the event of the election, such event cannot be said to have transpired until sundown on the day of the election, and a residence of thirty days, in Carroll's case, would not, therefore, have been complete, until after the polls were closed.

We are satisfied that the foregoing five votes, claimed by the defendant, were properly rejected by the court, and that the finding, that he received only 535 legal votes, was correct. We now come to such of the votes, which were claimed, and counted by the court, for the relator, as are claimed, by the defendant, to have been illegal.

It is first claimed, that two votes at Sanel precinct were improperly counted for the relator, by the court. It ap-

(Purging the polls.)

pears from the record, that two ballots or pieces of paper; with the name of the relator, and the names of the other candidates of his party, printed thereon three times, were found in the ballot-box, and rejected by the officers of the election; at the trial, the court counted each of these ballots as one vote for the relator. It is claimed, that these pieces of paper were each three tickets folded together, within the meaning of the 34th section of the act relating to elections (Wood's Dig. 378), which provides, that where two tickets are found folded together, they shall both be rejected. In our judgment, this point is not well taken.

The 24th section defines a ballot to be, "a paper ticket, containing the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is intended by him to be chosen." Thus, a ballot or a ticket, is a single piece of paper, containing the names of the candidates and the offices for which they are running; if the elector were to write the names of the candidates upon his ticket, twice or three or more times, he does not make it more than one ticket; so long as there is but a single piece of paper, there can be but one ticket, and if it can be discovered therefrom, who are voted for, and the offices for which each was intended to be chosen, it must be counted as one ballot, notwithstanding the voter may have, through inadvertence or otherwise, repeated the names and offices; being but one piece of paper, it can be but one ticket, and can only be counted as one vote. Cushing, in his work on the Law and Practice of Legislative Assemblies, p. 40, § 106, observes, "if a ballot happens to have the same name written or printed on it more than once, it is not therefore to be rejected, because, as it is but one piece of paper, it cannot be counted as more than one vote, and though the name is written on it several times, it is yet but one name; thus, where ballots are prepared for distribution, in the usual way practised in some of the states, that is, by the name of the candidate being written or printed several times on the

(Purging the polls.)

same slip of paper, for the purpose of being cut into separate ballots, and being nearly cut apart, but so as to adhere at one end, and an elector inadvertently put two votes, not entirely separated, into the box, they will be counted as one ballot, unless there are circumstances present, which afford a presumption of fraudulent intent, in which case, they must either be rejected or the whole ballot set aside.”\*

Nor did the court err, in allowing to the relator the votes of Melindy, Whipple and McGrew; the objection taken by the defendant to their votes, is not well founded. They were not disqualified by reason of section 4 of article II. of the constitution; that section does not add to nor take from the conditions upon which the fact of residence is made to depend; it merely declares, that “no person shall be deemed to have gained or lost a residence, by reason of his presence or absence while employed in the service of the United States,” which means simply that, in determining the fact of residence, presence or absence in the service of the United States shall not be taken into account, or, in other words, neither presence nor absence in the service of the United States is a condition upon which the fact of residence can be affirmed or denied. Hence, the mere fact that Melindy came to Mendocino county in the capacity of physician, McGrew in the capacity of supervisor, and Whipple in the capacity of laborer to the Indian reservation, did not deprive the first of his former residence in Siskiyou, nor the second of his former residence in Sutter, nor the last of his former residence in Contra Costa; nor did it preclude them from acquiring a residence in Mendocino, if disposed to do so. That it was their intention to acquire a residence in Mendocino county, sufficiently appears from the evidence; such being the case, there is nothing in the constitutional provision in question (which is merely declaratory of the common law), which stands in the way of their doing so.

\* See Cambridge Election, Cush. Elect. Cas. 3; Case of Hopkinton, Ibid. 26.

(Purging the polls.)

The claim that the court allowed to the relator two votes folded together, and found in the ballot-box at Round Valley precinct, is not sustained. Whether the two ballots in question were folded together or not, was a question of fact for the court below to find, and the court found that the evidence failed to prove it. The affidavit of Eberlee (who was inspector at that place), on the motion for a new trial, fully explains the alleged irregularity, and shows that, in fact, the two ballots were not folded together; upon comparing the number of ballots with the poll-list, it appears, that there were no more ballots cast, than there were persons who voted, thereby showing that, in all probability, the two ballots in question were not cast by the same person.

So far as the vote of John Ward, at Calpella precinct, is concerned, the counsel for defendant is mistaken in supposing it was counted by the court for the relator. The court, in effect, found as a fact, that Ward did not vote for the relator, but for the defendant; and we think, the finding is sustained by the evidence. If Ward was a minor, and he voted for the defendant, another vote ought to have been taken from him; the court, however, so far as we are able to discover, allowed Ward's vote to stand; of this action, at least, the defendant ought not to complain.

In regard to the points made by counsel for the defendant, upon the stipulations of the 23d June and 7th July, it is sufficient to say, that in the progress of the case thereafter, until the actual taking of the evidence to which they respectively relate, both parties seem to have virtually disregarded them. Thus, on the 8th July, the next day after the last stipulation was made, the defendant served notice of a motion to file an amended answer, to be heard on the 18th of the same month; the motion was allowed, and the amended answer filed on that day; on the next day, the 19th, the plaintiff filed an amended complaint, and on the same day, the court made an order,



(Purging the polls.)

on motion of the defendant, directing that the amended answer be considered as the answer to the amended complaint; on the 9th July, the next day after the notice of the defendant to the effect that he desired to amend his answer, the plaintiff obtained an order from the judge of the court, allowing further time to take testimony, which was served on the opposite party. What effect the amendments to the pleadings may have had upon the issues, as they stood at the time these stipulations were made, we are unable to determine, for the original pleadings are not in the record. It may be, that the relator could have gone safely to trial, upon the issues as they then stood, upon the evidence already taken, at the time the stipulation was made, but could not, if those issues were to be changed.

Moreover, it is very doubtful, whether these stipulations were ever binding upon the people, who were the real plaintiffs in the case; they were not made by the attorney-general, by whom the suit was instituted, but only by the private counsel of the relator. Theoretically, the people alone are interested in the determination of the controversy involved in this case, and no court would be justified in enforcing, as against them, a stipulation made by the relator or his counsel, to their prejudice. The action is, in no legal sense, under the control of the relator; it was brought in the name of the people, and to enforce their will as expressed through the ballot-box, and not merely to redress the wrongs or enforce the rights of the relator. *Searcy v. Grow*, 15 Cal. 117.

It is very evident, that the case could not have been fairly tried or its merits reached upon the evidence taken prior to the 7th July, for the evidence then in only disclosed about one-third of the official vote of the county, and it would have been impossible to determine, upon the real merits of the case, whether the defendant or the relator had been elected. Under all the circumstances, we think the court might in its discretion, allow the additional evidence to come in. Then the only question re-

(Purging the polls.)

maining would be, whether the defendant was surprised; if so, he would have been entitled to a postponement of the trial, in order to procure further evidence on his side, if there was any within his reach. But although he knew that the evidence had been taken by the referee, and would be reported to the court, and might be received, yet, when it was received, he did not claim that he was thereby surprised, and therefore, not ready to proceed with the trial; on the contrary, he was silent, and with full knowledge of all the facts, took the chances of a finding in his favor. It will not do to say, as he now does, that he did not ask for an adjournment, because he was precluded from so doing by the stipulation in question; the stipulation having been disregarded by the other side and by the court, was no longer obligatory upon him; this must have been known both to him and his counsel.

The record in this case contains nearly 300 printed pages; it is manifest, that the whole case could have been fully and fairly presented in a record containing, at the outside, not more than fifty pages; for this, we are satisfied, that the respondent was, in a great measure, responsible; he must, therefore, be taxed with half the costs of making up and printing the transcript.

Judgment affirmed.

SHAFTER, J., dissented.

---

In purging the polls of illegal votes, the rule is, that unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, not from the majority candidate. *Sheppard v. Gibbons*, 2 Brewst. 128; *McDaniels' Case*, 3 Penn. L. J. 310; *Cush. Elect. Cas.* 583. (But see ante 211.) Votes received from electors, whose names do not appear on the assessment list, without the preliminary proof required by law, were formerly held to be *primâ facie* illegal, and to be rejected from the count, unless adequate proof were made on the trial, of the legality of each such vote. *Mann v. Cassidy*, 1 Brewst. 2; *Weaver v. Given*, *Ibid.* 141. But the modern and better

(Rejection of polls.)

opinion seems to be, that such votes, being illegal when received, cannot be made legal by the production of evidence of qualification, on the trial, which ought to have been, but was not, produced to the election officers. *Sheppard v. Gibbons*, 2 Brewst. 129; *Myers v. Moffet*, 1 Brewst. 230.

Though the vote of an idiot ought not to be received, yet the vote of a man, otherwise qualified, who is neither a lunatic nor an idiot, but whose faculties are merely greatly enfeebled by old age, is not to be rejected. *Sinks v. Reese*, 19 Ohio St. R. 307.

---

LITTLEFIELD v. GREEN.

In the Circuit Court of Cass County, Illinois.

MAY TERM 1869.

(REPORTED 1 CHICAGO LEGAL NEWS 330.)

[*Rejection of polls.*]

Where the provisions of the election law have been entirely disregarded by the officers, and their conduct has been such as to render their returns utterly unworthy of credit, the entire poll will be rejected.

But, even in such case, legal votes proved to have been actually polled, must be computed.

The facts of this case are fully stated in the opinion of the court, which was delivered by

SMITH, J. On the 9th of April 1867, an election was had, for and against the removal of the county-seat of Cass county, from Beardstown to Virginia in said county. The election was authorized by an act of the legislature passed in that year; the act provides that any citizen of said county, who may legally vote at said election, may contest its legality, by giving a notice in writing of his intention so to do, to any other citizen of said county, who may legally vote at said election in opposition to the

(Rejection of polls.)

vote cast by the person contesting; and said contest shall be conducted in compliance with existing laws of this state, with reference to the contest of elections for county officers, so far as the same may be applicable. R. S. 1845, ch. 37. This proceeding was commenced in the mode prescribed by statute, and was heard before three justices of the peace in said county, who made their certificate in favor of H. H. Littlefield, the contestant, and thereupon, Green, the respondent, perfected his appeal to the circuit court of Cass county.

The principal contest was made on the returns from the Virginia precinct. It was claimed that illegal votes were cast in the Beardstown and Lancaster precincts, but no particular irregularity was shown to have occurred in the election. It was admitted in the argument, that if the Virginia vote was thrown out, the majority would be against removal; if counted, there would be a majority for removal. Virginia precinct cast, at that election, 2820 votes, and the judges certified that 2820 votes were cast for removal and none against removal; that precinct had, at the date of the election, an entire population of between 1700 and 1800, and about 450 legal votes. The names of the first 668 voters, as appears from the poll-books, appear to have been registered and voted in alphabetical and numerical order; as, for example, John Needham is the first name that appears upon the poll-books, as having voted on the 9th day of April; his name appears first upon the register, under "N," and the next name on the poll-books that begins with N is registered immediately under the name of Needham, and so on; through these poll-books and registers, up to about No. 668, the voters appear to have been registered and voted in this exact alphabetical and numerical order; from 668 to 955, the voters appear to have voted in alphabetical order from A, running through the alphabet to Z, and then from Z to A in the inverse order; from 955 to 985, this order is changed, and the names on the poll-books

## (Rejection of polls.)

appear, from 4 to 6, together, commencing with the same letter of the alphabet; from 986 to 1191, the alphabetical order is resumed, and this continues, with an occasional break, through the entire poll-books to 2820.

It was not, however, claimed upon the argument, by the respondent, that the names upon the poll-books were genuine after 668, but that, up to that number, they were legal voters. But the proof showed, that there were but 453 legal voters in the entire Virginia precinct, and that the names of these voters, instead of appearing first upon the poll-books, in consecutive order, as they should have done, were scattered through the entire poll-books from No. 1 to No. 2500. Take, for example, the name of S. B. Freeman, who swears that he voted at about two o'clock P. M., his number is 480; H. D. Freeman states, that he voted not long after, and his name is 2572; and that J. M. Stribling and Joseph Hunt voted about the time he did, and their numbers are 2571 and 2573. The Freemans could not have voted so near together in point of time, and their numbers be so far apart; and then H. D. Freeman, Stribling and Hunt were legal voters, and their names should have appeared within 453, or, at least, within 667, upon the theory of the respondent, that the first part of the poll-books are genuine up to No. 667, and the balance fabricated; and not one of the witnesses is able or willing to explain, how the names of these legal voters got into company of those that are admitted to be spurious and fictitious.

It was insisted, upon the argument, by the respondent, that the poll-book of the Virginia precinct, should be taken as evidence, that as many as 400 or 450 legal voters had voted at the election, for removal; and the question is here presented, whether these irregularities and frauds, appearing upon the face of the poll-books, in connection with the other testimony in the case, destroys them as evidence of what they purport to be. It is, undoubtedly, the rule, that if the canvassing court can separate the

(Rejection of polls.)

legal from the illegal votes, and reject the illegal ones, they are bound to do so, and that mere irregularities in the manner of conducting an election, or a fraud on the part of the officers, will not vitiate, unless it be of so gross a character as to destroy all means of ascertaining the true results. *Piatt v. People*, 29 Ill. 72; 8 N. Y. 68. Our own supreme court has laid down this rule: "if an irregularity of which complaint is made, be shown to have deprived no legal voter of his rights, nor admitted a disqualified person to vote, if it cast no uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it, it may be overlooked. *Piatt v. People*, 29 Ill. 72; *Ang. & Ames Corp.* 94.

How, then, does the vote of the Virginia precinct appear in the light of this law? do the irregularities and frauds, admitted to have been practised, place the true result in uncertainty? were disqualified persons admitted to vote? and was this procured by those seeking to derive benefit from their own frauds? It was admitted, that out of the 2820 votes cast in that precinct for removal, not more than 453 could be legal votes; but it is insisted by the respondent, that, inasmuch as they have proved that upwards of 400 legal voters were in the Virginia precinct, at that time, they should be counted for removal. But which 400 names on the poll-book, can the court count as legal voters? the first, second, third or fourth 400? For, it is in proof, that a large number of the names of those claimed to be legal voters, do not appear upon the poll-books within the first 400, or the second 400, but many of them appear as high up as 2500. It would be impossible, then, for the court to count the first 400 names on the poll-books as legal votes. Where shall the court commence to count the legal votes, and where shall it draw the line between the legal and illegal votes? Do not these facts cast an uncertainty over the whole result?

But how do the poll-books, registers and ballots appear in the light of the testimony of the officers, who conducted

## (Rejection of polls.)

the Virginia election? It appears from the evidence, that the Virginia interest was determined, from the first, to carry the election for removal at all hazards; and hence, two of the board of registry, after acting two days, declined to act further, one, for the reason that he would not be a party to the frauds that were about to be perpetrated, and the other, for the reason that he could do more off the board, than he could do on it, to further the ends to be obtained. Other men were selected who were not so tender-footed upon questions of honesty, and the registers were completed; and they contain, as the board say, 2820 names of legal voters, in a precinct that contained about 1700 inhabitants, all told. When one of this board was asked, if any other person assisted in making the registers, he refused to answer, because it might subject him to a criminal prosecution; and when asked, what guide they had to enable them to make the corrected registers for the Virginia precinct, he refused to answer, for the same reason.

On the day of election, these officers shut themselves up in a school-house; an aperture in the window was prepared, through which to receive the ballots; and there these officers of the law, after having solemnly sworn "that they would studiously endeavor to prevent fraud, deceit and abuse in conducting the election" (with their false and fabricated registers before them), commenced receiving the 2820 votes, which they certify were cast on that day, for removal, in the Virginia precinct, when they must have known, there were not more than 453 legal voters in the precinct. When one of the judges was asked, if 2820 different persons actually presented themselves to vote, on that day, he refused to answer, because it might subject him to a criminal prosecution; when asked, how many names were on the poll-books when the polls closed, he refused to answer for the same reason; when asked, how many *bonâ fide* ballots were counted out of the box, after the polls were closed, he refused to answer, because it

(Rejection of polls.)

might subject him to a criminal prosecution; and when asked, whether any other persons acted as clerks in preparing the returns, on the night succeeding the election, in the Virginia precinct, he refused to answer for the same reason.

This is, substantially, the character of the testimony of all the officers who conducted the election, on this point. One of them swears that he cannot account for the names appearing in alphabetical order on the poll-books, from A to Z, and from Z to A, but thinks that men voted in that order, a thing impossible and incredible. Another of these judges of election swears, that they stopped counting the ballots about midnight, and lay down on the benches and slept until daylight; that they left the ballot-box there *unsealed*; that at daylight, they resumed counting, went to breakfast at the usual hour, and left the ballot-box in the house; other persons were in the house; this witness, when asked whether he numbered all the ballots that were put in the ballot-box that day, refused to answer, because it might criminate him, and asked *the protection of the court*; and yet, this judge of election says, he was the one whose duty it was to receive the ballots and put them into the ballot-box. He refused to answer whether he put in 1000 ballots, because it might criminate him, but thought he might have put in 800; was quite certain he put in 600, but could not say that they were all legal votes. Another of these election officers swears, that the names of the voters might have been called off, by some person having a list of them outside, and the ballots handed in, through the hole, by this person; another witness swears, that he voted through a hole in the window, and could not see what was going on inside. And this is the class of testimony, running through 1000 pages or more of manuscript, from which the court is asked to rescue the legal votes, and decide that at least 453 legal votes were cast for removal in the Virginia precinct. The difficulty is, that these registers, poll-books, ballots and tes-



(Rejection of polls.)

timony, are so contradictory, mysterious, evasive, false and fraudulent, that they are utterly unworthy of credit. If they could be personified, and put upon the stand as witnesses, and made to speak their contents, they would not be believed for a moment, in the lowest and most insignificant court in the country.

I think it may be fairly inferred from the evidence, that some time before the election, the leading spirits of Virginia, including many of her representative citizens, concocted a plan to carry this election by fraud or unfair means; and their only excuse was, that they feared Beardstown would be guilty of the same thing; and hence, a board of registry was selected to carry out this fraudulent purpose. The ballot-box, on the day of election, was stuffed with 2370 illegal votes; the poll-books and registers have, on almost every page, these badges of fraud; and the officers of the election have the effrontery to come forward and attempt to sustain it, by the most unblushing testimony that was ever heard in a court of justice. The law will presume everything against a set of men who are shown to be pursuing such a fraudulent and dishonest course.

But it is insisted by the respondent, that it is in proof, that 453 legal voters voted in the Virginia precinct for removal, and that they ought to be counted, notwithstanding the frauds perpetrated by the officers of the election; that a legal voter ought not to be disfranchised on account of the misconduct of an election officer. But there is no proof, outside of the poll-books, that 453 legal voters actually voted at that election; there is some proof, that this number resided in the precinct at that time, but the court cannot presume that they voted on the 9th April, much less, that they voted for removal. There is evidence, *dehors* the poll-books, that about 50 legal voters did actually vote for removal, in the Virginia precinct, and they should be counted; but there is no evidence, except the poll-books, that the 400 voted at all; their names might

(Rejection of polls.)

have been fabricated, for aught that appears, the same as the 2370 fictitious ones that were voted on that day. As I have remarked, the irregularities at the Virginia election, the fraud on the part of the officers conducting it, and those who were even to derive a benefit from its success, the unaccountable manner in which the names appear on the poll-books, the contradictory and unsatisfactory testimony introduced to support them, and the refusal, on the part of the perpetrators of this fraud, to give the court any insight into the labyrinth of uncertainties, renders these poll-books and ballots entirely unworthy of credit, and renders it impossible to count the legal votes and reject the illegal ones.

It is probable that Virginia, upon a fair and honest vote, could remove the county-seat; such a vote would be sanctioned by the law of the land, and endorsed by the moral sense of the community. Were I, however, to declare the result in favor of Virginia, upon these facts, it would, indeed, have the force and effect of law, *but it would not be law*. It would be allowing the majority, by fraud, to trample upon the rights of the minority; it would be an endorsement, by a court of justice, of one of the most stupendous frauds of modern times.

It is insisted by the respondent, that there were frauds committed in the Beardstown precinct, and so there were; but this did not justify fraud on the part of Virginia; the court cannot offset one fraud against another, and give the victory to the one committing the greatest fraud. But no fraud, on investigation, was charged upon the officers who conducted the election in Beardstown; it was proved that about 47 illegal votes were cast against removal by thirty-day men, and those naturalized in the county court, and they must be thrown out. So with the Lancaster precinct, 194 illegal votes were cast for removal, and these must be cast out; the court, in these two cases, has no difficulty in separating the true from the false.

(Rejection of polls.)

After rejecting the poll-books and other record evidence of the Virginia precinct, and allowing it all the legal votes proved *dehors* the record (about 50), it leaves a majority against removal of 227 votes. It is due to the importance of this contest, to the able and distinguished counsel on both sides, and to the earnestness and zeal with which counsel for the respondent have urged their points, that I should have considered this contest well, carefully and at length; and while I may have erred, I have a consciousness of having done right.

Decree for contestant.

---

Perhaps no question which can arise in reference to the elective franchise has, in Pennsylvania, given rise to more diversity of opinion than the one discussed in *Littlefield v. Green*, namely, the circumstances under which the poll of an entire election division may be rejected; the one political party holding that it is only allowable where there has been no legal election, or where it is impossible to purge the poll of the illegal votes; and the other, that it is a matter of judicial discretion to determine whether the infractions of law on the part of the election officers were or were not sufficient to render their returns unworthy of credit; in other words, the one party would infringe as little as possible upon the chartered rights of the people, whilst the other would vest the whole political power in a partisan court.

In *Mann v. Cassidy*, 1 Brewst. 60, the doctrine of *Littlefield v. Green*, received the approval of the court; it was there said by Thompson, P. J., "that where the conduct of the election officers is such, as to destroy the integrity of their returns, and to avoid the *primâ facie* character which they ought to bear, as evidence, due and adequate proof must be demanded of each vote relied on." So, in *Thompson v. Ewing*, Ibid. 107, it is said by the same learned judge, that "the whole conduct of election officers may, though actual fraud be not apparent, amount to such gross and culpable negligence, such a disregard of their official duties, as to render their doings unintelligible or unworthy of credence, and their action entirely unreliable for any purpose." The same rule was enunciated in *Weaver v. Given*, Ibid. 140; and in *Batturs v. Megary*, Ibid. 162, it was held by Allison, P. J., and Peirce, J., that divisions

## (Rejection of polls.)

in which the law had been entirely disregarded should be stricken out; but Brewster, J., held, that though the court possessed this power, it should only be exercised in the extremest case—where it was impossible to ascertain the true vote. In *Gibbons v. Sheppard*, 2 Brewst. 1, the court exercised this power, on the ground of gross infractions of the election law on the part of the officers; and the like action was had by the general assembly of Pennsylvania, in reference to the same election, in *Thayer v. Greenbank*, 1 Brewst. 189; and by the house of representatives of the United States, in *Myers v. Moffet*, *Ibid.* 230; but the notoriously partisan character of these decisions entitles them to little credit. The same remark is applicable to the case of *Howard v. Cooper*, 2 Cong. Elect. Cas. 275. The contrary doctrine was held by the senate of Pennsylvania, at the session of 1871, in *Dechert's case*, where it was asserted, that the dangerous and odious power of counting men *in*, or counting them *out* of their seats in the legislature, by the rejection of returns of district elections, held in due form of law, and at which legal votes were polled, has no more foundation in the laws of the commonwealth, than in the general principles of justice. “To reject the whole poll, because the inspectors failed to comply with every prescribed regulation, would be to place a higher value on the statute regulation, than on the right itself; it would be a sacrifice of substance to form.” *People v. Cook*, ante 440.

It is beyond doubt, however, that there are causes for which it is the duty of the court to reject the polls of an entire division (*Fry v. Booth*, 19 Ohio St. R. 27); but the limit of this power is indicated by Chief Justice Thompson, in delivering the opinion of the supreme court of Pennsylvania in *Chadwick v. Melvin* (ante 256), where he says that “there is nothing which will justify the striking out of an entire division, but an inability to decipher the returns, or showing that not a single legal vote was polled, or that *no election was legally held*.” (And see *Powers v. Reed*, 19 Ohio St. R. 207.) Thus, as in *Chadwick v. Melvin*, it is sufficient to reject the poll that the election was not held at the place designated by law; and to the same effect, is *Knowles v. Yeates*, 31 Cal. 82. So, if the polls were closed before the hour appointed by law; *Penn District Election*, 2 Pars. 526; or, if they were kept open after the legal hour, where enough votes were subsequently polled to have changed the result. *Locust Ward Election*, 4 Penn. L. J. 341. In these and other cases that may be imagined, it is evident there is either a failure to hold any legal election, or that the conduct of the officers has rendered it im-

## (Limitation.)

possible to ascertain the exact result. The other theory, that for gross disregard of the provision, of the election law on the part of the officers, a poll may be rejected, though legal votes may have been polled, which the parties are prepared to prove, is at variance with the principles on which our institutions are founded, and vests a most dangerous discretionary power in the hands of an elective judiciary, the last body upon which a lover of popular freedom would desire to see such a power conferred. If a partisan decision be made by a legislative body, bad though it be, the public sentiment is not so much shocked; the people look upon it as a question of power; but when the courts fall into the same error, it lessens that respect for their decisions, which is essential to a preservation, in its purity, of our republican form of government.

---

## COLLINGS'S CASE.

In the Common Pleas of Luzerne County, Pennsylvania.

DECEMBER TERM 1861.

(REPORTED 2 LUZERNE LEGAL OBSERVER 57.)

[*Limitation.*]

A petition to contest an election, which is not filed within the time prescribed by law, will be quashed, on motion.

In Pennsylvania, the time for contesting an election, runs from the day of election, not from that of the meeting of the return judges.

This was a petition contesting the election of E. B. Collings to the office of clerk of the courts of Luzerne county, to which he had been returned as duly elected at the general election held on the 8th October 1861. The petition was filed on the 16th November; and the respondent moved to quash, on the ground that the petition had not been filed within ten days after the election, as required by law.

CONYNGHAM, P. J., delivered the opinion of the court. A petition or complaint of thirty qualified electors, duly

(Limitation.)

attested by two of the petitioners, has been filed, contesting the election of E. B. Collings, who has the certificate of the return judges, showing his election to the office of clerk of the courts of Luzerne county. A motion has been made, on the part of Mr. Collings, to quash this complaint, on the ground that it was not filed in the prothonotary's office in due time, that is, within ten days after the election. The question now before us is upon this motion.

The 5th section of the act of 2d July 1839 (Purd. Dig. 817), regulates our action in such a case; it is therein directed how the petition shall be filed, containing, among other provisions, this clause: "and such complaint shall not be valid, or regarded by the court, unless the same shall have been filed in the prothonotary's office, within ten days after the election." The late election was held on the 8th of October, and this petition was filed on the 16th day of November of the same year. Was it filed too late to be considered by the court? It is not claimed that it was not filed more than ten days after the election, but it is contended, that it is still within time, because the return judges, to count what is called the soldiers' or army vote, did not meet until the first Tuesday of November (the 5th day of the month), and that, until that time, there was no decision or return of any particular candidate, whose election could be contested. From the examination of the complaint, and the other matters agreed upon here, in the argument, by the counsel, the army vote makes no difference in the case, Mr. Collings having received a majority of the votes of the people, at the county-polls, and the army vote not reducing his number to a minority.\* The complaint, in its specifications, makes no objection to the army vote, or any proceedings under it, but it is founded on frauds and irregularities alleged to have been com-

\* But suppose, the county-poll had shown a majority of 1000 for the incumbent, and the army vote had reduced that majority to one, where would have been the equity or justice of this decision?

## (Limitation.)

mitted at several district polls within the county, and not at all in the manner of conducting the election of the volunteers. The validity or invalidity of the election, and all questions in relation to it, raised by the complaint, are exclusive entirely of the soldiers' vote, except in the circumstances connected with the time of the final count by the judges, and their giving a certificate.

There appears to be, under the words of the act we have quoted, a limit fixed by the statute to the time of filing a petition—"within ten days after the election;" here a question arises in the outset, what is meant by the words, "the election." It is argued, that these words are intended to comprise the whole machinery connected with the day of election, the meeting of the judges, and their final count and certificate, and that, if filed within ten days after the completion of all these duties, the petition is still within the statutory time and limit.

In order to ascertain the true meaning of these words, it is our duty, in the first place, to refer to the statute itself and to kindred acts, and endeavor to discover the sense in which the same expression is used in other places. These words are repeated several times in the act, and under such circumstances that the context can leave no doubt of their true meaning; we refer to a number of instances, taken from the act of July 1839, regulating elections generally. *Purd. Dig. 372, et infra.* The sheriff is to give notice of the general election, twenty days before the election (pl. 19); inspectors and judges are to meet at the place of holding the election (pl. 22); at elections as aforesaid, tickets are to be delivered, &c. (pl. 32); the judges are termed, judges of the election (pl. 34 and 38); time of opening the election (pl. 35); persons offering to vote at any election (pl. 37); and so, qualifications of persons to vote at an election (pl. 43); duty of the judges when the poll is closed (pl. 53); and when this is done, the election is said to be finished (pl. 55); the return judges are to meet the third day after the day of election. These are some

(Limitation.)

of the many instances in which the word "election" is used in the acts regulating the election of officers, including the clerks of the courts, and in them there is no room left for doubt, but that all the cases refer to that which is to be done, and is then final and complete, on the regular election day; that is to say, the doings on the election day, without reference to what is to be performed afterwards, are regarded as the election. There are other matters to be carried out, such as the meeting of the judges, the execution of returns, and the proper delivery and filing of certificates, which are all proper, in order to ascertain and legally make known the results of the election, but which, in fact, form no part of the election itself or election proper. The election in each district, the effect of which is to be ascertained by a subsequent gathering together of all the districts, is said to be *finished*, in the words of the 74th section, when the count of each district, after the closing of the polls, is completed.

We find also the same evident meaning, belonging to the expression "the election," in the third article of our state constitution. In speaking of the qualification of voters, residence and assessment, ten days "before the election," that is, the day of voting, are prerequisites of the right to vote. It would be a novel reading of the constitution, to hold that, because the return judges do not meet until the third day after the day of voting, the time of their meeting and count or certificate of votes, is the period to which the residence and assessment refer, and that one becoming a resident, and being assessed, seven days before the election day, would be authorized to vote. Now, if the term "election" be held, in reference to matters *preceding* the day, to apply to election day, why shall we, under the constitution and statutes referring to the same general subject, give a different meaning to the same words, when applicable to *subsequent* matters? In examining the acts of assembly relating to elections, and the constitution also, we find that the words "the election," invariably bear



## (Limitation.)

but one meaning; in no place are they used in a more enlarged sense, than if taken in their common and popular meaning; in so judging, we but follow the rule laid down in Dwarris on Statutes 702, that "the words of a statute are to be taken in their ordinary signification and import, and regard is to be had to their general and popular use; and the meaning of words, spoken or written, ought to be allowed to be, as it has constantly been taken to be." If then, as we think, the term "election" refers to the requirements and duties of the election day, the complaint in this case, according to the words of the statute, was not filed within ten days thereafter.

It is contended, however, that the words in the act are merely *directory*, and that, therefore, in order to carry out the spirit of the act, and permit an examination of the alleged frauds, we can comprehend all the subsequent proceedings, including the last meeting of the return judges, under the general term "election," and consider the complaint, because filed within ten days after that period. Under the rules for construing statutes, we do not see how we can hold the words of the act *directory* merely, because, as used, they are imperative and peremptory in their requirements. The act provides, as we have seen, that the complaint shall not be valid or regarded by the court, unless filed within a required period, readily, from the words, to be ascertained; there seems no latitude for discretion; the order is positive, that it shall not be considered by the courts or regarded as valid; the delay has closed the whole matter, and the courts are forbidden judicially to look at it, for the purpose of investigating the charges. In no reported case that we have seen, has such language been held *directory*; there are decisions in the books, in which affirmative words, such as *shall* or *may*, according to the intent of a statute, and to carry out its evident purport, have, in the discretion of a court, been regarded as *directory* and not absolutely imperative; but when there are negative words declaring that, unless such

(Limitation.)

a thing be done or be done in a particular manner, a court shall not have jurisdiction, there is not a case to be found, in which the court has not considered such express prohibition as imperative and positive in requirement. We refer to *Robins v. Bellas*, 4 Watts 255; *Woods v. Ingersoll*, 1 Binn. 146; *Gearhart v. Dixon*, 1 Penn. St. R. 224; *Steiner v. Coxe*, 4 Ibid. 13; *McElhiney v. Commonwealth*, 22 Ibid. 365; *Trustees of Erie v. Erie*, 31 Ibid. 515; and the older case of *Davison v. Gill*, 1 East 64; these decisions show the distinction with regard to the discretionary construction of statutes; *discretionary* being merely another word for *directory*. In a compulsory or imperative statute, there is no room left for discretion, on a question, whether a court is obliged to obey its requirements. The rule we have referred to, is thus laid down in *Dwarris on Statutes* 715: "negative words *will* make a statute imperative; and it is apprehended, affirmative *may*, if they are absolute, explicit and peremptory, and show that no discretion is intended to be given." Now, can negative words be used more emphatically and imperatively, than in the particular case before us? is there anything from which an intention to give a discretion can be gathered?

It is argued, however, that at an election like the present, where there may be a vote of soldiers at a distance, unless such a discretion be exercised, there may be a great failure of justice. This may be; but it does not follow, that the court can rightly assume a jurisdiction which is expressly denied them by statute. It does not come within the general jurisdiction of the court of common pleas, but by virtue of a special and limited authority to act in a certain case; if the case be not within the provision of the statute, the court cannot take the authority; that would be assuming legislation. "A *casus omissus* can, in no case, be supplied by a court of law, for that would be to make laws; judges are bound to take the act of parliament as the legislature has made it." *Dwarris on Statutes* 711. "A failure of justice will not be sufficient ground for constru-

(Limitation.)

ing a statute against its clear meaning, so as to give a court jurisdiction." *Pitman v. Flint*, 10 Pick. 506. But even if there be plausibility in the argument with regard to the soldiers' vote, that question does not arise here; because there is no complaint as to anything arising out of this vote; the objections are all to the votes in the home districts, and under this complaint, if received, these are the only matters asked to be the subject of inquiry. The mere allusion to the army vote is not sufficient; any reference in the complaint, not the subject of inquiry by the court, would, on motion, be stricken out as irrelevant; see *Carpenter's Case*, 2 Pars. 537; *Kneass's Case*, *Ibid.* 553; it will hardly be contended, that subjects which do not affect the election, can be used merely to give the court jurisdiction.

It is also pressed upon the consideration of the court, that there can be no contest till after the return of the judges, showing that some one is elected. But this is a mistake; it is not required that a *defeated candidate* or *his friends* shall contest an election; in no part of the act, except that relating to a governor, or to a member of the senate or house of representatives, are the contesting or disputing candidates called parties; in these cases, it becomes necessary to name them as such, for they have a part to perform in organizing the tribunal to judge of their rights. But it is not so in the case of the clerk of the courts; it is the people who complain of an *undue election* or *return of an officer*, and where, as in the present case, objections are founded on alleged frauds in particular districts, all of them to be, by law, ascertained and known within ten days after the election proper, and not later, shall they not be held to complain within the statutory time? The people in each district know of the result there, as soon as the count is completed, and declaration made of the result by their judge, under the 75th section (*Purd. Dig.* 377, pl. 56); again, a list of the voters and one of the tally-papers are forwarded to the prothonotary's

(Limitation.)

office, within three days, to be open to the inspection of all; indeed, the prothonotary is bound, by the 85th section (pl. 68), to give copies of all such papers to any person applying for the same; so that there can be no difficulty in ascertaining all facts and charges of the character now advanced, within the required period.\* Would it be in accordance with the purport of the statute to say, that objectors may postpone the inquiry, until they find whether they want to object or not; or, if they do ascertain frauds, keep them secret until after the judges make a return?

Whatever may be the fact, that ordinarily, only a defeated candidate or his friends do contest an election, and therefore, that until a return be made, they cannot know the necessity of so doing, such, as we have already said, is not the theory of the law; any qualified voters may initiate the complaint, and make known to the court, that in any particular district or districts, there has been fraudulent voting, specifying in what the fraud consists, and how it would vary the particular return of a district. When the result of the whole election becomes known, and the full return is made by the judges, the court can see if the alleged frauds in particular districts, will vary the several returns of the election, and if found to affect it, then "the returns of elections will be subject to their inquiry, determination and judgment." The law presumes that, at any rate, some of the people, without regard to

\* The fallacy of this reasoning will be seen at a glance, by putting a very supposable case; the incumbent might be returned by a considerable majority, say 500, there might be full proof that he received 50 illegal votes, but this would not change the result, and therefore, no petition could be filed, that the court would sustain; but if, on the counting of the soldiers' vote, the majority for the incumbent were reduced below 50, it is evident, that the position of affairs would be entirely changed, and that there would be now a good case, which could not have been presented before. This is no argument in favor of the position, that the limitation of ten days is directory merely, but to show that, on the equity of the statute, it should not be held to commence running until the final count of the soldiers' vote.

(Limitation.)

individual friendship, or party feelings, or the defeat of any candidate, will act without delay.\*

There is an object, too, in requiring speedy action in such cases. On the one hand, the complainants have the declaration of the judge of the count at the poll of each district, the returned list of voters and tally-papers, and ten days after the election to inquire and ascertain facts; such is the time limited to the complainants, because the greater the delay, the more difficulty is there, not only in ferreting out a fraud, but also in looking up the evidence to answer the charges, when made, by those who desire to support the election. In the present case, too, where the claim for delay is made only in consequence of waiting for the count of the army vote (which does not affect the question), we may add, as a fact understood and informally made public through the papers, within the ten days, that the return judges did meet on the third day after the election, and add up the votes of the several county districts; the result, so far as at this time, under the present case, important, was as fully, though not as formally declared, as since the final meeting of the judges; it is to be presumed, that the complaining parties knew, or might have known, by early and due inquiry, the frauds which they now allege. Why, then, should the clear, plain and direct language of the act of assembly be violated, when it was entirely within their power to raise the question in due season? If the frauds alleged had been in the army vote, or the result were in any way affected by a refusal to count it, there would be, as we have said, plausibility in the argument, that the necessity would justify an extension of the time. Even then, however, it might be questionable, whether, rather than

\* A more fallacious argument was never penned; it only shows how the judgment of an estimable, honest and learned judge can be warped by his party feelings, in a contested election case; and how unfit a depository of this delicate jurisdiction, is the judicial department, as organized in the United States.

(Limitation.)

directly disregard the words of the act, it should not be considered an oversight in the legislature, in not providing for a contest in such an election or return, in the manner provided with regard to other elections. Perhaps, if not reached by this statutory proceeding, there might be another remedy by proceeding in a *quo warranto*.

We do not now undertake to decide what our opinion would be, if the contest depended upon facts connected with the final return of the judges, or the count or rejection of the army vote, or any fraud or irregularity therein, as in the Philadelphia case to which our attention has been called through the papers; there would still be difficulty in reaching the case. Yet, so great would be the inconsistency of tendering to the people a remedy for fraud, which, by no zeal or promptness, they could be able to use, from inability to procure a return of the votes, or learn their character, within ten days after the election, that necessity, if this were the only resort, might induce the court to take cognisance of the proceeding. But the rule of action in such case, cannot apply to another wholly different, where the reason for such action entirely fails, and the foundation upon which the claim for the jurisdiction is erected, does not exist. In the one case, the people cannot act; in the other, they have had the opportunity, in due season, to initiate the remedy, but, through misapprehension or other reason, have neglected to avail themselves of it.

Here, the only question raised, which can affect the result, is, whether the election on the 8th day of October last, was conducted fairly and legally at certain election districts within the county of Luzerne; the mere fact, that there was a vote of soldiers, not varying the election as decided by the vote within the county, cannot be brought in to authorize a contest which should have been initiated at an earlier day. The complaining voters might have ascertained, and were bound to have ascertained, the matters alleged, within the allowed ten days after the election,

(Limitation.)

irrespective of the question of who might be the successful candidate. It is true, the court could not issue process to inquire into the matter, until it was legally ascertained that establishing the truth of the complaint would vary the result, nor until a successful candidate was returned upon whom the process could be served; yet this would not prevent the commencement of the proceeding, by the filing of the complaint, which is not required to be done in court, but only in the prothonotary's office.

We repeat, that in no part of the act, relating to an office such as the present, is the defeated candidate looked upon as a party, or as liable, in any event, to costs, unless voluntarily assumed; the petitioners or complaining voters, acting in the pursuit of their own rights, for the honest purpose of purifying the ballot-box from fraud, are alone looked to as contestants, and in one event alone liable to costs. It is not regarded as the complaint of the candidate; he cannot be permitted to withdraw or in any way control it. If the alleged fraud, upon being proved, would apparently change the result of the election, unless the people represented by the petitioners agree to it, an arrangement made between the different candidates, could not be used to defeat the contest; it may be abandoned and withdrawn, if no one will come forward to prosecute it, but the candidate cannot so control it. It is not the right of the individual alone who may be interested in the office, to defeat or set aside a fraudulent election; in him there may be a personal or pecuniary interest, but with the people there remains a public or moral right to act.

To sustain the present proceedings, we must say, in effect, that in *all cases* of contest under the act of 2d July 1839, the words "within *ten* days after the election," are to be construed "within *thirteen* days after the election," or, within ten days after the judges shall have made their final and united count. This, it seems to us, where there is no positive necessity for such a construction, in order

(Limitation.)

to protect the rights either of the public or of an individual, would be an alteration or evasion of the statute, which courts ought not to countenance. We have, in this case, sought to take cognisance of the complaint, if, in our opinion, the law would permit it. The allegations of irregularity and fraud are of such a character, that they deserve investigation, if, under the statute, it can be given; but if the court has not jurisdiction, we cannot assume it, even to attempt to redress an alleged wrong. If, as we think, the legislature has not given us the power to act upon a complaint made and filed five weeks after the election, we cannot exercise it. In the words of Mr. Justice King, in *Clark's Case*, 2 Pars. 524, "we have no authority as a court over the subject, except what is derived from statute; if the question is not presented to us in the form prescribed, we are without jurisdiction."

We have thus endeavored to give our own views, with the reasons upon which they rest; we may be wrong, and other judges may arrive at a different conclusion, and therefore, we hope that, in *this matter of form*, the supreme court, if desired, may be induced to review our action. We are aware of the decision in *Carpenter's Case*, 14 Penn. St. R. 486, but the point there was different from the one presented now. Though the judgment of the common pleas, upon a contested election, may be final, when made upon the merits, or even the mode of setting forth the complaint, yet, a refusal to receive a complaint against an election, is different, and we believe, can be reached by the supervisory process of the supreme court; we refer to *Scheetz's Case*, mentioned in the note to *Purd. Dig.* 818; and the expression of Mr. Justice Lewis, in *Commonwealth v. Garrigués*, 28 Penn. St. R. 11, "that the regularity of such proceedings may be called in question on a *certiorari*."

We refuse, then, to receive this complaint, because not filed in time to give the court jurisdiction; and direct, therefore, that it be quashed or dismissed, simply for the



(Limitation.)

reason that the petition was filed out of time. Holding this opinion, we prefer to put it in this shape, as most likely to be reviewed; if we should take cognisance of the case, and then dispose of it, even on the present ground, our judgment would clearly be final, and could not be re-examined; if, however, we refuse to hear the case, as we do, the supreme court may examine it on a *certiorari*, or may, by a *mandamus*, order us to proceed and give the party contesting, a hearing.

Complaint dismissed.

---

A more equitable and just conclusion was reached by the court of quarter sessions of Philadelphia, in the case of Thompson v. Ewing, where it was ruled by Thompson, P. J., that the ten days within which a petition contesting an election, must be filed, count from the day the return judges make out their certificate, and not from the day on which the polls close. 1 Brewst. 67. The same point was decided, in Stevenson v. Lawrence, 1 Brewst. 126, when Judge Thompson said: "It is to be observed, that the present question has no relation to a case in which the votes given within the county and a return of the same, made within ten days from the day of election, are the subject of complaint set out in the petition filed, in which case, the restriction to the time mentioned may well have a practicable and sensible application, but that this complaint is made against an undue election and return of votes cast by persons not within the limits of this county, who were in the military service, and authorized to vote under the provisions of the election law, the returns of whose votes could not be legally enumerated until the second Tuesday of November next after the election. It is admitted that the vote cast within this county gave a majority to the contestant, W. C. Stevenson; that no return of any vote was made by the return judges, until after the second Tuesday in November 1861, more than a month after the day of the election; that the returns of the military vote were not open to inspection, until more than ten days after the day of the election. It thus appears, that at the expiration of ten days after the day of the election, the only votes of which actual knowledge could be had, viz: the county votes, showed that the contestant had then no cause to make any complaint, no petitioners could

## (Limitation.)

then take the oath required to give validity to a petition contesting the returns. If the right of a party to complain of an undue election or return, be absolutely fixed, on the tenth day after the election, so as to require him then to contest the return, and not afterwards, the entire proceeding as to him must be considered as terminated, and no other return of votes can be received to affect his rights. It would be absurd to suppose, that the legislature intentionally passed, on the same day, two laws, one of which allowed votes to be taken, but not enumerated by the return judges until November, and which votes are to affect the candidates voted for, while the other law obliges the parties complaining of the undue election or return of any officer, to file their objections to the entire returns of such election, within ten days from the election day." It will be seen, that these cases are not absolutely at variance with the decision of Judge Conyngham in Collings's Case, but the reasoning of Judge Thompson must satisfy any one that if the exact case had come before him he would not have followed that decision. See 1 Pechwell xxvii. But, in Louisiana, the very point has been decided, that a notice of contest is in time, if given within ten days after proclamation of the result. *Davis v. Maxwell*, 22 La. An. 66. See *Bowen v. Hixon*, 45 Mo. 340.

# PENN DISTRICT ELECTION CASE.

In the Court of Quarter Sessions of Philadelphia.

SEPTEMBER SESSIONS 1848.

(UNREPORTED.)

[*Division of election district.*]

Upon the division of an election district, the functions of the election officers are destroyed, and cannot be exercised in either of the new election districts into which the old one is divided; the official functions of local officers fall with the political annihilation of the locality for which they were chosen or appointed.

Where an act of assembly, dividing an election district, appointed election officers for the ensuing general state election, it was held, that they were invested with all the powers of officers chosen by the people, and consequently, were competent to conduct the presidential election in the same year.

The petition in this case set forth that at the preceding March election, there were two election polls opened in the district of Penn, and votes polled at each, of which regular returns were made; that by the aggregate vote of the two polls it appeared that John L. Kucher had the highest number of votes for judge of election, and Henry Walters and Conrad Carpenter for inspectors; that the said election had never been set aside; that on the 7th of April 1848, an act was passed empowering the court to appoint officers in certain events; and that on the 10th of April 1848, another act was passed appointing Thomas Davis, Conrad Carpenter and William Wentzell, officers for the October election, but no provision was made by said act for the presidential election; the petitioners, therefore, further setting forth that they were in great doubt as to who were the proper officers to conduct this election, prayed the direction of the court in the premises.

KING, P. J., delivered the opinion of the court. The prayer of the petition asks for no precise relief; it merely

(Division of election district.)

asks that we shall make such order as to us shall seem proper. On the argument, however, the wishes of the petitioners were expressed in a more definite form; they were, that the court should appoint judges and inspectors of the presidential election to be held to-morrow in this district. We possess no authority to appoint election officers of this or any other district, unless such power be given by law; if such a power be so given, it is our plain duty to execute it; if no such power be given, it is equally our duty to refuse to act. The character and importance of the election should only make us more cautious of interfering in its organization in this district, unless we have the clear right to do so.

What is, then, the power invoked? and, under what circumstances, is its exercise asked? All our authority over the subject is found in the 21st section of the "act regulating election districts," passed the 7th April 1848; it is brief, being contained in these words: "that from and after the passage of this act, in all cases where the citizens of the district of Penn shall fail to elect judges and inspectors of elections, or the same shall be set aside, from informality or otherwise, the judges of the court of quarter sessions shall fill all vacancies so occurring." P. L. 367. This law is remarkable for its clearness and precision; two perfectly-defined cases of vacancies in the election officers are provided for; one, where the citizens have failed to elect, the other, where they have held an election which has been set aside for informality or otherwise; all other vacancies, not embraced in these two classes, are to be supplied under the general laws governing the other election districts of the commonwealth. This question might be elaborated, but could not be made clearer; the enactment is one that he who runs may read. When our authority, under this act, is invoked, one of two things must be shown to us, either that the people of the district have failed to hold an election for the choice of their own election officers, or, that having held such election, the same

(Division of election district.)

has been set aside by the judicial act of this court, after a full trial and hearing, prosecuted in the manner pointed out by law for contesting township elections; for supplying any other class of vacancies, the general laws must be looked to. So far as respects myself, there is no novelty in this construction; it was given by me, in April last, when applied to by the inhabitants of this township to select judges for a special election to be held for commissioners; I refused, because the applicants did not exhibit one of the cases provided for by the act of 1848. At the time of this refusal, I was most anxious to exercise the authority invoked, because a local dispute running very high in the district, made such a choice of election officers by the court, most desirable; but I felt I could not do so, with a proper deference to the plain letter of the law, which too clearly expressed its own purposes, to leave any room for doubt.

The law under which we are called to act being thus ascertained, what are the facts to which we are asked to apply it? They are few and simple. On the 17th of March last, the district of Penn composed one election district; on that day, being the day fixed by law for holding township elections, the citizens of the district assembled at the place of holding them; very soon a dispute arose in regard to the choice of officers of the election, each party claiming to have chosen them; the two constables of the district opened separate election polls, the elections were held, and two sets of returns of these elections were filed in the clerk's office, where they have both remained since, the question of their regularity never having been submitted to the court of quarter sessions, in the form of a contest of the election. So stood matters until the 10th of April 1848, when an act of assembly was passed, dividing the Penn district into two election districts, making the centre of Broad street the line between them, and designating places in each of the new divisions, where all general and special elections should thereafter be held, by the citizens residing

(Division of election district.)

within the respective precincts. The act then declares "that the officers elected on the 17th of March last (namely, Thomas T. Davis, Conrad Carpenter and William Wentzell), for conducting the general elections to be held on the second Tuesday of October next ensuing, shall act as officers and conduct the election in the west precinct, at the new election poll created by this act, to wit, at the house of Jacob Peters, Jr., at the southwest corner of Ridge road and Girard avenue; and the judge of the said election shall appoint a judge of election of the east precinct; and each of the inspectors of said election shall appoint an inspector for the east precinct; the said judge and inspectors so appointed to hold and conduct the election at the new election poll created by this act, to wit, at the house now used as the commissioners' hall, at the northeast corner of Tenth and Thompson streets." P. L. 461. In pursuance of this act, Davis, Carpenter and Wentzell appointed a judge and inspectors for the eastern precinct, and they and their nominees conducted the recent general election in the new precincts.

One of the doubts entertained by the petitioners is, as to the powers of these designated officers to hold the presidential election, considering their authority confined to the holding of the October election. Previously to expressing our opinion on this branch of the case, we deem it important to consider, what was the legal effect of the division of the district into two precincts, by the act of April 1848, on the elections held on the 17th of March 1848, even admitting those elections, as regards judge and inspectors, to have been perfectly regular. These elections were held for judge and inspectors of the whole and undivided district of Penn, then composing a single election district; when, however, the legislature thought fit to divide this district territorially, into two new subdivisions, for election purposes; to create two separate and distinct election polls, requiring separate and distinct officers, and a separate organization, the single election district of Penn went out of existence, its place being supplied by the new precincts. It was not the case where a given

(Division of election district.)

part of an old district was formed into a new one, and where provision was only made for the new district; the whole district was cut into two parts, two new election districts formed from it, and the old district thus wiped out of existence as a separate election district. On what principle could the election officers of the repealed election district have acted in the new ones? They could not have done so in both, that is quite certain; could they have made choice of either? if so, what would have become of the other district? suppose their residence had been in different precincts, how could either of them act as the officer of an election where he had no right to vote? All these difficulties are solved by the application of a perfectly familiar principle, viz: that the official functions of local officers fall, with the political annihilation of the locality for which they were chosen or appointed. In the leading case on this subject, *Respublica v. McClean*, 4 Yeates 399, the supreme court ruled that, where new counties are formed out of parts of old ones, the commissions of justices of the peace, who had been commissioned for the old counties, but who, by the subdivision, were thrown into the new ones, were thereby vacated: "his commission," says Chief Justice Tilghman, speaking of the justice in that case, "necessarily became void by the political annihilation of that part of the county for which he was commissioned, and where he resides." It was on this principle, that this court held, last term, that the office of settler of the township accounts of Passyunk township became vacant, from the fact that the officer elect had been thrown into Moyamensing, by the annexation of that part of the territory of Passyunk in which he lived into Moyamensing.\*

\* See *North Whitehall v. South Whitehall*, 3 S. & R. 121, where it was said by Gibson, J., that "on the breaking up of a township, by forming it into new ones, there is an end of its overseers, and consequently, of all corporate powers." It is not, however, in the power of the legislature to abolish a judicial district, and thus vacate the commissions of the judges; they are protected by the constitution. *Commonwealth v. Gamble*, 2 Legal Gaz. 20.

(Division of election district.)

The legislature, in acting on these subjects, seem to have been regulated by the same principle. By an act passed the 4th of February 1846, Cedar ward, in the city of Philadelphia, was divided into three wards, viz: Spruce, Cedar and Lombard; the 5th section of this act authorized the judge and inspectors of old Cedar ward to appoint judges and inspectors for Spruce and Cedar wards, and authorized the original Cedar ward officers to act in Lombard. P. L. 25. By the act regulating election districts, passed the 16th of March 1847, John O'Brien, Phillip Duffy and Henry Funk were, by name, appointed inspectors of the Richmond district election, and by a special clause, the authority of the judge and inspectors of the unincorporated district of the Northern Liberties, of which it seems Richmond formed a part, was confirmed. P. L. 424. These precedents might be increased; but enough have been cited, to show that, when the legislature have heretofore created new wards or districts, they have never supposed that the old election officers possessed any power in the new ones formed out of them; nor do they seem to have entertained a doubt as to their right to name the election officers of the new districts, or, what is the same thing, to authorize other designated individuals to name them. The necessary result seems, therefore, to be, either that the officers named in the act of 1848, and their nominees, are to hold the presidential election; or, if their granted power be not large enough for that purpose, a case has arisen not provided for by law; a case, however, in which the court have no power to appoint, because it neither arises from failure to elect, nor from an election set aside by judicial process.

The remaining question, then, for consideration is, whether the legislative nominees were judges for the single election in October last, or whether they have had imparted to them all the powers and authorities with which they would have been invested had they been duly elected in March last? If they have such powers given to them,



(Division of election district.)

under the true construction of the act of 1848, then they are the proper officers to hold the presidential election; for, by the 14th section of the general election law, it is declared, "that the general, special, city, incorporated district and township elections, and all elections for electors of president and vice-president of the United States, shall be held and conducted by the inspectors and judges elected as aforesaid, and by clerks appointed as is herein-after provided."\* Of the authority of the legislature to name the officers of newly-created election districts, we entertain no doubt; precedent and public convenience both justify it. In naming such officers, the legislature gave them all the powers and faculties necessary to carry the duties assigned to them into effect. There is no more familiar officer in our civil code, than the judge or inspector of elections; in assigning an individual to execute such an office, he is, *ipso facto*, clothed with the powers necessary to execute the duties imposed on him.

It is the opinion of the court, that, in this instance, it was the legislative intention to give their nominees the same powers as if they had been the duly-chosen and undisputed inspectors and judge of the Penn district, elected in March\* last. That the legislative intention was, to completely organize these districts, there being no assignable reason why they should have intended to limit the

\* It has been ruled by the court of common pleas of Philadelphia, that the offices of inspector and judge are annual ones, and therefore, that those elected at the general election are to hold the presidential election in the same year. 16th October 1852. Re-affirmed by Allison, J., 1st August 1864. It has also been decided by the same court, that one appointed to fill a vacancy in the office of inspector, in place of the one elected by the people, but who failed to appear and act on the day of election, was entitled to hold the office for the whole year. March 1852. The contrary doctrine, however, was held by the predecessors of the present court, in the case of the Penn District Election, where it was held, that such party was only an officer *pro hac vice*, and that the regularly-elected inspector could appear and claim his seat, at a succeeding election. 11th May 1850. See *People v. Cook*, 8 N. Y. 67, 88 (ante 441). The same court has determined, that the clerk of elections, when appointed, is an annual officer, and cannot be removed by the inspector, except for some disqualifying cause. March 1852.

(Division of election district.)

authority of the election officers named by them, to one election in the year, leaving all others exposed to the conflicts that had theretofore disturbed and nullified former elections. That although there is some ambiguity in the law, yet, taken as a whole, it sufficiently manifests the legislative intention to have been, to create a complete and not a partial organization of the districts; that in describing their nominees as "the officers elected on the 17th of March last," they indicated the true character intended to be imparted to them, and defined their powers to be plenary. That an officer elected in March to hold the general election in October, has, in virtue of his office, the right to hold all intermediate and subsequent elections held during the year; and that treating and describing these nominees as such officers, shows by plain and natural inference, the intention to have been, to give them all the functions properly pertaining to such officers. That the real and manifest object of this enactment was, to validate one of the polls held in this district in March last; and that the legislature have done so in the most effectual way, by declaring the individuals voted thereat to be "elected;" that this word, used in the section, casts a direct light on the intention of the legislature, and shows it to have been, to give to the officers, that precedent justified them in creating and necessity required them to create, the full and complete legal powers necessary to perform the duties charged upon them. And finally, that this being a question of statutory construction, according to the settled and immemorial usage of courts of law, it is the duty of this and every other court, to seek in this and every other statute, for the true meaning of the law-giver; to execute it, when it is ascertained, as that intention existed when the law was passed, and not, from any change of events, to seek to evade a solemn duty, or defeat the action of a law which they veritably believe to be the true one intended by its framers.

In one of those continual applications which are made

(Division of election district.)

by election officers and citizens, to the judges of this court, for advice, I, certainly, in April last, expressed an opinion, that the functions of the election officers of Penn district, named in the act of 1848, did not come into existence until the October election, and that they were incompetent to hold a special election for district commissioners, taking place after the district was divided into precincts. This opinion was expressed, in an interview with the disputing parties, at my own dwelling, when I made an anxious effort to promote a compromise among the citizens of the district, which, if it had been effected, would have restored peace and harmony among them. My then opinion was given without argument, and without the assistance of a conference with my brethren, who now all think that the advice that was given on the occasion should have been, that the officers created by the act of the 10th of April, and their nominees in the eastern precinct, were the proper officers to hold the district election. To the opinion of my brethren, thus given, after argument and anxious examination, I am, of course, bound to defer.

That I or any other judge should occasionally err in responding to the questions put to us, under the various local election laws and arrangements of this great and populous judicial district, is certainly not strange; our answers are given in court and out of court, formally and informally, on the spur of the moment, and being questions public in their nature, affecting whole communities, we always, when applied to for advice, feel bound to respond, according to our impressions at the time. But whether the functions of the legislative nominees came into existence in October last, as I seem to have thought in April last, or whether, according to the opinion of my brethren, they came into effect immediately on the passage of the act, is of little weight on the question now before us, which is, not simply when these powers began, but what was the extent thereof, when they went into effect. These powers were, in the opinion of the court, co-

(Division of election district.)

extensive with those of any other election officers of the commonwealth.

The question before us, it will be remembered, is a simple one of the true meaning of an act of assembly, and nothing more; every other matter agitated on the argument is foreign to the subject; our duty and authority has this extent and no more; and we have exercised it, after fully and carefully considering the subject in every point of view in which it has been presented, or in which we have been able to regard it. Being of opinion, that these nominated officers possess all the legal characteristics of other inspectors and judges of election, of course, they have the same legal disabilities; and if they, or any of them, have taken upon themselves functions incompatible with the office of judge or inspector, the remaining officers must fill the vacancy according to law.

---

In Pennsylvania, by the act of 20th April 1854, the courts of quarter sessions have power to divide boroughs, wards and townships into election districts, to alter the bounds of election districts, and to form new districts out of parts of adjoining townships. Where commissioners report, under this act, in favor of dividing an election district, the question of division must be submitted to a vote of the electors, the result of which is conclusive, and takes away all power of the court over the report. *Kugler's Appeal*, 55 Penn. St. R. 123. Wherever a new division is formed entirely out of an old one, the officers elected are required by the act of 28th April 1857, to appoint election officers for the new division. *Gibbons v. Sheppard*, 2 Brewst. 2, 56. This act, of course, has provided for the difficulty that occurred in the principal case, but the point there decided is an important one, and of more than mere local interest. In New York, it has been determined, that the legislature cannot, constitutionally, change the boundaries of a city or town, so as to alter an assembly district. *Kinne v. City of Syracuse*, 3 Keyes 110.

STEVENSON *v.* LAWRENCE.

In the Court of Common Pleas of Philadelphia.

JUNE TERM 1862. /

(REPORTED 1 BREWSTER 131.)

[*Decision at the next term.*]

A statutory provision requiring the court to hear and determine a case of contested election "at the next term," is merely directory; the jurisdiction does not fall with the expiration of the term.

Motion to dismiss the complaint, on the ground that the time prescribed by the statute for hearing and disposing of the same had elapsed.

*Cassidy* and *Hirst*, for the motion.

*Conarro* and *F. C. Brewster*, contra.

ALLISON, J., delivered the opinion of the court. When this case was last before the court, it was upon a motion to dismiss the petition of the contestants, and that the court do not proceed further with the cause. Upon this motion, the court, as then constituted, divided in opinion, my brother Ludlow being in favor of the motion, and my brother Thompson against it, the former holding that the jurisdiction of the court over the case was at an end, expressing at the same time his willingness to hear the evidence, reserving the question of jurisdiction; Judge Thompson holding, on the other hand, that the case was not out of court, but before them for further investigation and final determination. Upon this state of facts, the court being unable to proceed, on the invitation of my brethren, I have come into this case, upon the question as stated to me, "what entry should be made upon the

(Decision at the next term.)

record where the court is equally divided in opinion on a question of jurisdiction?" The precise point raised by the question was, however, abandoned practically by the counsel on both sides; and the question considered by them, and to which the attention of the court was mainly directed, was, what is the true and proper construction of the 5th section of the act of 2d July 1839, providing for the election of prothonotaries, &c., under which law the petition of William C. Stevenson was filed in this court?

The difficulty which has arisen in the cause is, as to the true intent and meaning of the clause of the said section which says, "and the court shall hear and determine such contested election at the next term after the election shall have been held." It is contended, that this is imperative upon the court, and that if the election contested shall not have been determined before the expiration of the next term, the case falls for want of further jurisdiction. In the construction of statutes, affirmative words enjoining the performance of an act by a public officer, are generally regarded as directory only; negative words make a statute imperative, and it is apprehended, affirmative may, if they are absolute, explicit and peremptory, and show that no discretion is intended to be given. *Dwarris on Statutes* 175. If, to the clause under consideration, the words "and not after," had been added, we would have a perfect illustration of the principle stated; these words of negation would convert that which, in its ordinary signification, is but directory, into a command, taking from the court all discretionary power, by the use of language imperative and compulsory. It would require the clearest possible case, where the language used was affirmative only, under the well-settled rules of interpretation of statutes, to justify a court in holding such language to be imperative; in the words of *Dwarris*, just cited, it must be absolute, explicit and peremptory. In the act now before us, the distinction is clearly taken by the legislature (no better illustration could be cited), where it says, "and such complaint

(Decision at the next term.)

shall not be valid, or regarded by the court, unless the same shall have been filed in the prothonotary's office, within ten days after the election." Here is a clear limitation upon the power of the court; the language employed leaves no door open for question or doubt; "shall not be valid or regarded by the court," has but one signification; it negatives the power to take action on the complaint, by the use of language absolute, explicit and peremptory, unless the condition precedent has been complied with.

In the case of *People v. Cook*, 14 Barb. 293, the principle is stated thus: statutes directing a mode of proceeding of public officers are regarded as directory, unless there is something in the statute which shows a different intent: so also, in *People v. Allen*, 6 Wend. 486. A statute which requires a public officer to perform an official act respecting the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer. Lord Mansfield, in *Rex v. Loxdale*, 1 Burr. 447, says, "there is a known distinction between things required to be done by act of parliament, and clauses merely directory;" in *Rex v. Sparrow*, 2 Str. 1123, the appointment of overseers was held to be valid, though made after the time designated in the act; the statute 54 Geo. III. prescribed the times of holding courts of quarter sessions; it was decided that quarter sessions held at other times were always considered good; so also, the statute of 43 Eliz. directed apprentices to be bound out until 24 years of age, yet a binding, under the statute, until 21, was held to be good. Under our election laws, the ruling has been frequent and uniform, in this and other courts, that numerous requirements of the law, enjoining upon election officers the performance of specific acts, when not coupled with a question of fraud, are regarded as directory merely, and not to vitiate the election when

(Decision at the next term.)

omitted to be done, or when the act itself is imperfectly performed or performed out of time.

The third section of our *habeas corpus* act provides that if any person committed for treason or felony shall not be indicted and tried in the next term after such commitment, it shall be lawful for the judges or justices, and they are thereby required, to set at liberty such person, on bail. The language here used is imperative, "and they are hereby required;" yet, it was held, in *Commonwealth v. The Jailer*, 7 Watts 366, that a person laboring under an infectious disease was not entitled, of right, under this section, to be tried at the next term; other exceptions are recognised in 16 S. & R. 304; 2 Whart. 501; and 1 Dall. 9. The eighth section of the same act imposes upon any judge or justice who shall, on application, refuse or neglect to award a writ of *habeas corpus*, a penalty of £300; yet, the supreme court, in *Ex parte Lawrence*, 5 Binn. 304, the case of *Passmore Williamson*, 26 Penn. St. R. 9, and the more recent case of *Williamson v. Lewis*, 39 Penn. St. R. 9, construed this section to mean, that judges were not bound, on every complaint of illegal restraint of liberty, to allow the writ. These latter instances of the construction which has been given to statutes, are strongly in point, for they are statutes in favor of the liberty of the citizen; in one, the language is that of command, and in the other, a penalty is imposed for a refusal to obey the requirements of the law.

Upon the argument, our own statutes, relating to writs of *quo warranto* and *certiorari* were cited in support of the view taken by the contestant. The same language, in substance, is used, as in the act under consideration; "and the court shall, at the term to which the proceedings of the justices of the peace are returnable in pursuance of writs of *certiorari*, determine and decide thereon." The practical construction given to these acts, by this and other courts, has not limited the power of the court to the term to which these writs are made return-



(Decision at the next term.)

able; it is, however, but due to the cause, to say, that no reported case was cited in which the question had been considered and decided. These authorities, to my mind, settle clearly the point, that the language employed in the act of 2d July 1839, requiring the cause to be decided at the next term, is but directory, and ought to be so regarded, unless there be something in the statute which shows a different intent, and would therefore require us to give it a different construction.

The first element to be extracted from this or any other statute, in our search after its true signification, is to ascertain, if we can, its spirit and intent. The object to be obtained is, to enable the court of common pleas to inquire, determine and judge of an undue election or return, upon the complaint of thirty or more qualified electors; the court are enjoined, in judging concerning said election, to proceed upon the merits, and determine upon the same, according to the laws of this commonwealth; then follows the clause upon which the court differed in opinion,\* “and the said court shall hear and determine such contested election, at the next term after the election shall have been held.” The design of the law is, to secure an investigation of a matter in which the citizens generally, and the candidate claiming title to the office by election, are deeply interested. Questions are involved in such an issue, of the gravest importance, affecting alike the highest principles of honesty and fair-dealing between man and man, the purity of the ballot-box, and the vindication of the elective right of the citizens of the commonwealth; to guard these rights, each of them sacred and worthy of legislative protection, the court are enjoined to investigate the merits of the case, and finally determine the same according to law. This, I hold, is the material intent of the legislature, to be secured only by a final determination

\* The court divided politically; the judge coincided in opinion with his political associate; and the point was affirmed in the supreme court by a political majority of the same views.

(Decision at the next term.)

of the case in court; but inasmuch as they directed that a commission should not issue, upon a contest being certified to the governor, until the court should have determined and adjudged on the complaint filed, they directed the court to hear and determine the same at the next term.

But suppose, as in this case, the court, for good and sufficient reasons, do not or cannot hear and determine the complaint within the time designated—what then? Is the law, as to the case already in progress before the proper tribunal, to be regarded as a dead letter? Are the citizens and contestants alike to be turned away, and told that the stroke of the clock has paralyzed the arm of the court, and that they must go without remedy for an alleged violation of public and private rights, because that which was not of the essence of the thing to be done has not been complied with by the officer of the law, either with or without cause? I think not; I can gather no such meaning from the act, and can regard the command as to time only in the light of an injunction to the judges to speed the cause, and at the next term, if possible, fulfil the material requirements of the law, by finally determining the case upon its merits. Any other view, it seems to me, reverses the natural order of things, prefers the unimportant to the material, gives to the minor consideration, namely, the time within which a decision is to be rendered, precedence of the more substantial and weighty matters of the law, under consideration; for certainly, it is far more essential that the court shall decide the main question, than allow it to fall dead before the judges, who are enjoined to decide upon it finally and upon its merits, by language quite as explicit as that used to indicate the time within which it ought to be determined.

Carpenter's Case (14 Penn. St. R. 486) seems to have been relied on in support of a contrary view, but that case decides nothing more than that the supreme court had no revisory power, by *certiorari*, of proceedings under the act of 2d July 1839, and that the decision of the common pleas

(Decision at the next term.)

was final; all that Judge Gibson says in that case is by way of argument in support of this proposition, and in my opinion does not apply to the question now before the court; nor does the point appear to have been even incidentally raised in the court above, unless the mere citation of the words of the law by the chief justice, in support of a totally different principle, are capable of such construction and application, which I think they are not. I am, for the reason stated, of the opinion that the case of the contestant is still in court for determination and final judgment on the merits.

Upon the question as to the proper entry to be made upon the record, where the court is equally divided on the question of jurisdiction, I do not deem it necessary to say more than that the case of *Bingham v. Cabbot*, 3 Dall. 18, cited upon the argument, by the counsel for the respondent, is to be regarded only as if a motion for a *venire de novo* had been made, which motion fell, because the court was equally divided upon the question as to whether the court below had jurisdiction of the original cause of action.

LUDLOW, J., dissented.

---

The point decided in this case was affirmed by a majority of the supreme court (Thompson, C. J., and Sharswood, J., dissenting), in *Donegan v. Fletcher*, 65 Penn. St. R. 21, where it was held that this provision of the law was merely directory; the dissenting judges, however, held that if the term expire without a determination of the contest, the proceedings fall as effectually as if the court itself had ceased to exist. *Ibid.* 47.

## MANN v. CASSIDY.

In the Court of Quarter Sessions of Philadelphia.

MARCH SESSIONS 1857.

(REPORTED 1 BREWSTER 43.)

[*Discontinuance.*]

The contestant in a controverted election case, has no power to discontinue the proceeding; the question is one between the public and the incumbent of the office.

This was a petition by upwards of twenty qualified electors of the city of Philadelphia, contesting the election of Lewis C. Cassidy to the office of district-attorney of the county of Philadelphia, and alleging that William B. Mann had been duly elected to the said office. During the course of the proceedings, the legislature created an additional district-attorney for the said county, and William B. Mann having been appointed to that office, his counsel moved for leave to discontinue this proceeding.

THOMPSON, P. J., delivered the opinion of the court. The only question presented by the counsel of the respondent, upon his last argument addressed to the court, was, whether Mr. Mann, as the "next highest candidate" to the party returned, or his counsel, has the right, at the present stage of the proceeding, to terminate the case, by entering a discontinuance.

We entertain strong doubts whether, in a proceeding like this, which is not a suit *inter partes*, the common-law form of discontinuance, which a plaintiff alone can employ, is at all applicable. The proceeding is not a suit at law; the party receiving the *next highest number of votes* is not made a plaintiff; he is not liable to the costs of the proceeding, nor is he compelled to take any part in the inves-

## (Discontinuance.)

tigation; he comes in voluntarily, and may so depart when he pleases; the complaint is not made by him; his act has not subjected the county to the costs of the investigation, nor, however frivolous the complaint made, can he be rendered responsible, by the imposition of costs, or otherwise; he acts with entire freedom, and the position of a *party in the trial*, which the 150th section of the act of 1839 gives to him, imposes no duties upon him, not even that of becoming a party, as the same section provides for the introduction of another, as a party, in case of his absence or neglect. If he may discontinue the proceeding, he may do so at any stage of the investigation; but the law contemplates no such termination, as the 157th section of the same act gives the judges authority to certify that the complaint was without probable cause, and in such cases, imposes the costs upon the petitioners; this indicates an intention that the complaint shall be investigated, and imposes upon the judges the duty of so doing. If, without investigation, the case may, at any time, be stopped, by a discontinuance, what protection is there against causeless complaints, by which the party returned may be annoyed and put to heavy charges, the public business of the courts interfered with, and the citizens of the county subjected to the costs?

Nor does the analogous proceeding before a committee of the legislature point to this as the method of terminating the investigation. The oath administered to the members of such a committee is, "to try the matter of the petition, and to give a true judgment thereon, according to the evidence, unless the committee shall be dissolved." This seems to leave no option to the committee to discontinue the trial, whenever the candidate *next highest in vote* may desire it; he cannot thereby dissolve the committee; nor does such power vest in the committee itself; the body creating the committee would seem to possess the only power to dissolve it. We know not what practice may prevail in such investigations by com-

(Discontinuance.)

mittees of the legislature, but it is evident, from the care which is manifested, in the provision for a full and fair trial, that such cases are to be regarded as important public matters, not to be commenced or terminated at the mere option of the individuals concerned in their results. The mere suggestion that, in any case, however undue the election or false the return, the candidate *next highest in vote*, who has come in as a party, may, *for a consideration*, be induced to enter a discontinuance, seems to demonstrate that such authority was not designed to be vested in him. The case is not his alone; public interests may require the investigation, though he decline to take further part in it. For these and many other reasons, which readily suggest themselves, we are strongly inclined to doubt the propriety, under any circumstances, of this method of terminating an investigation like the present.

But we are in no doubt as to the impropriety of recognising the discontinuance offered, as the case now stands. Mr. Mann became a party to this proceeding; he undertook to prove that great frauds had been perpetrated at the October election, and the language used by his counsel, Mr. Read, is, that "the whole evidence exhibits the most palpable frauds on the ballot-box."\* He claims thus to have established much that he alleged to exist; and yet, because by an act of assembly, which his counsel declares *has given him all he claimed*, he is relieved from any further *personal interest* in the case, and has publicly withdrawn from it, it is asserted, that by his simple "discontinuance," he can relieve the court from all further duty of determining whether those *most palpable frauds* have had any effect on the validity of the election. Certainly, none would more truly rejoice to be relieved from the further consideration of this case, than the court be-

\* After the delivery of this opinion, Mr. John M. Read, the counsel for Mr. Mann, stated that his client wished the proceeding to terminate, and retired from the case.

(Discontinuance.)

fore whom it has "dragged its slow length along;" but that relief can only be obtained by a conscientious discharge of the duty imposed upon us, not by avoiding it. If frauds have been proved, how can we omit to examine into their effect? Why was the court applied to? Not, certainly, to ascertain only Mr. Mann's right to the office, for which Mr. Cassidy held the return; for that purpose, the law has provided a writ of *quo warranto*. This is not such a proceeding; the question here is, not between two individuals only, but it is, whether the voice of the people has been falsely and fraudulently misrepresented; it is a public question, not, as the counsel of Mr. Mann stated they considered it, that of a private individual contesting the seat for a public office. While, then, we cannot prevent the party who is *satisfied*, from leaving the case, we cannot recognise any right or power remaining in him, after his departure, to further interfere in the case; he came in voluntarily, and he departs without hindrance; we think his power over the case departed with him. The discontinuance, therefore, cannot be recognised.

Discontinuance disallowed.

---

The principle of this case was recognised by the supreme court of California, in *People v. Holden*, 28 Cal. 139 (ante 491), where the court said, "theoretically the people alone are interested in the determination of the controversy involved in this case, and no court would be justified in enforcing, as against them, a stipulation made by the relator or his counsel, to their prejudice; the action is, in no legal sense, under the control of the relator; it was brought in the name of the people, and to enforce their will as expressed through the ballot-box, and not merely to redress the wrongs or enforce the rights of the relator." In the case of the Clinton County Election, it was ruled by Judge Woodward, that it is not in the power of a portion of the petitioners, in a contested election case, by withdrawing from the contest, to prevent an inquiry into the fairness of the election; 3 Penn. L. J. 166; and this was recognised as law in *Kneass's Case*, 2 Pars. 570. So, in *Collings's Case*, 2 Luzerne

(Appellate jurisdiction.)

Leg. Obs. 57 (ante 513), it was said by Conyngham, J., that the petition "is not regarded as the complaint of the candidate; he cannot be permitted to withdraw it, nor in any way control it; if the alleged fraud, upon being proved, would apparently change the result of the election, unless the people, represented by the petitioners, agree to it, an arrangement made between the different candidates could not be used to defeat the contest; it may be abandoned and withdrawn, if no one will come forward to prosecute it, but the candidate cannot so control it; it is not the right of the individual alone, who may be interested in the office, to defeat or set aside a fraudulent election; in him there may be a personal or pecuniary interest, but with the people there remains a public or moral right to act."

---

## GIBBONS v. SHEPPARD.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1870.

(REPORTED 65 PENNSYLVANIA STATE REPORTS 20.)

[*Appellate jurisdiction.*]

The supreme court has jurisdiction, on *certiorari*, to review the regularity of the proceedings of the court below, in a case of contested election, but not to rejudge the merits.

Where a statute requires the contestants to swear that the facts set forth in their complaint are true, it is enough, that they aver that they are true "to the best of their knowledge and belief."

The exercise of the power of amendment, in a contested election case, being a matter of discretion, is not reviewable on *certiorari*.

The refusal of the court below to quash the petition is not ground of error; so, a prayer in the petition to strike out certain returns, does not bring that question before the supreme court, the record not showing whether or not such returns were stricken out.

Certiorari to the court of Quarter Sessions of Philadelphia. These were petitions to the court of quarter sessions and court of common pleas of Philadelphia county, contesting the election of Furman Sheppard to the office of district-attorney of said county, and of the other offi-



(Appellate jurisdiction.)

cers returned as elected at the general election held on the second Tuesday of October 1868, and alleging that Charles Gibbons was duly elected district-attorney, &c. The court below decreed in favor of the contestants, whereupon the respondents sued out writs of *certiorari*, and removed the record to the supreme court.

*Phillips, Hirst and Biddle*, for the respondents.

*Rawle, Mann and Meredith*, for the contestants.

AGNEW, J., delivered the opinion of the court. These are important cases; they are political controversies; to be regretted, yet, for this reason, to be met in a spirit of candid inquiry. The contest of an election is a remedy given to the people, by petition for redress, when their suffrages have been thwarted by fraud or mistake; the constituted tribunal is the court of common pleas or the quarter sessions, as the case may be. By the acts of 2d July 1839 and 3d February 1854, the court is to "proceed upon the *merits* of the complaint, and determine *finally* concerning the same, according to the laws of this commonwealth." No bill of exceptions is given to its decisions nor appeal allowed, and its decisions are final; consequently, the supreme court has no jurisdiction over the subject.

The attempt to press into service the act of 1867 (Purd. Dig. 1496), as giving an appeal, lacked the earnestness of conviction, and needs no refutation; it gives no appeal, while the appeal given on the receiver's account, excludes the presumption that any other appeal was intended; the finality of the acts of 1839 and 1854 remains, and there is no implication of an appeal, for there is no incongruity in this respect. It is only in case of a strong repugnancy, that a former law is repealed by a subsequent act. *Street v. Commonwealth*, 6 W. & S. 209; *Bank v. Commonwealth*,

(Appellate jurisdiction.)

10 Penn. St. R. 448; *Brown v. County Commissioners*, 21 *Ibid.* 37.

Why, then, have the merits been so strongly urged? Why have the cases been termed appeals, and the parties appellants and appellees? Nothing but confusion can flow from these designations. The *certiorari* is a well-known writ, bringing up the record only; the parties are plaintiffs and defendants in error, and not appellants and appellees; the argument on the facts was, therefore, outside the record. That the merits belong exclusively to the court below, and cannot be reviewed here, is a settled question; *Carpenter's Case*, 14 Penn. St. R. 486; the court there quashed the *certiorari*, Gibson, C. J., saying, that "having no appellate jurisdiction, it would not be respectful or proper to express an extra-judicial opinion on the regularity of the proceedings." In like manner, this court quashed the *certiorari* in *Ewing v. Filley*, 43 Penn. St. R. 384; "our duty," said Lowrie, C. J., "is a very restricted one; for, as is admitted, we cannot re-try the case on the evidence, but can only consider whether it was tried before competent authority and in proper form." This is very plainly stated by Woodward, J., in *Chase v. Miller*, 41 Penn. St. R. 412-13 (a contested election case); after explaining our general power of review, he says, "but this statement is to be received with a very important qualification, that the errors to be reviewed shall appear on the record; this is necessary to all appellate jurisdiction, where cases come up by writs of error or *certiorari*; the only mode provided by law for bringing evidence, or the opinion of an inferior court, upon what is technically called the record, is by a bill of exceptions, sealed and certified by the judges, and as bills of exception are not allowed in the quarter sessions, no question which arises out of the evidence in that court, can be got up into this court; hence, while *certiorari* lies to the proceedings of the quarter sessions in road cases, in pauper cases, in *contested election* cases, and in other statutory

(Appellate jurisdiction.)

causes committed to the jurisdiction of that court, the writ brings up nothing but what appears on the record, without a bill of exceptions."

That neither the testimony nor the opinion of the court is brought up with the record, by a *certiorari*, has been reiterated over and over again. I refer to a few of the recent cases, to show that we have not departed from the doctrine of our predecessors: *Commonwealth v. Gurley*, 45 Penn. St. R. 392, opinion per Thompson, J.; *Church Street*, 54 Ibid. 353 (road case), per Thompson, J.; *Oakland Railway Co. v. Keenan*, 56 Ibid. 198 (justice and jury on sheriff's sale), per Woodward, C. J.; *Plunkett's Creek v. Fairfield*, 58 Ibid. 209 (pauper case), per Strong, J. In *Pennsylvania Railroad Co. v. German Lutheran Congregation*, 53 Penn. St. R. 445, a strong effort was made to get before us the merits of a view and assessment by a railroad jury, and the subject was again examined elaborately and the same conclusion reached. The strenuous effort to induce us to review the testimony, calculations and opinion of the court in these cases was, therefore, contrary to the settled law of the writ of *certiorari*; this excludes from our consideration the report of the examiner, all the calculations, and all the court did either by striking out or purging polls; they are not in the record, and all assignments of error founded on them fall.

Putting aside, then, these lures to error, the remaining assignments may be treated under three heads: those affecting jurisdiction; those relating to the procedure of the court; and those relating to the frame of the complaint. The first, involving the jurisdiction, is the oath to the petition; this concerns the city officers only. The act of 1854 requires that "at least two of the complainants shall take and subscribe an oath or affirmation, that the facts set forth in such complaint are *true*;" the oath to the petitions reads "that the facts are true, *to the best of their knowledge and belief*." This addition, it is asserted, lessens the strength of the oath; that the law requires the

(Appellate jurisdiction.)

absolute truth of the facts to be sworn to, and not the best knowledge and belief of the affiants. Does the law mean absolute verity? this is the question. The intention of the lawgivers must be discovered not only from the words, but from the object of the law, the special purpose of the oath, the nature of its subject, and the character and jurisdiction of the tribunal. The object of the law is to give the people a remedy; it is their appeal from the election board to the court, from an undue election or false return; the law is, therefore, remedial and to be construed to advance the remedy. The special purpose of the oath is to *initiate* this remedy, to give it the impress of good faith and probable cause; the *proof* of the facts must *follow*, not precede the complaint; it is contrary to our sense of justice, and to all analogy, to say, that a remedy shall not begin till the case has been fully proved. The law being remedial, and the oath initial only, it is not to be supposed, the legislature, representing the people, intended to subject the remedy to unreasonable or impossible conditions; the remedy would be worthless and the legislature stultified; correct interpretation will shun this result.

This brings us to the subject of the oath; in a city of 800,000 inhabitants, embracing a surface of many square miles, no two nor two hundred men can be invested with the ubiquity and the omniscience to see and to know all the facts, in every precinct, necessary to contest the whole poll of the city; nay, they could not, from personal knowledge, contest the poll of a single ward. Besides, there are essential facts which they cannot know personally; they cannot pry into the ballots; they may believe, or may be credibly informed, that 153 unqualified persons voted a certain ticket, but they cannot know it; yet this knowledge is essential to the contest. Their knowledge, to be personal, must be as ubiquitous as the fraud, and as thorough as the whole number of voters, their residences, qualifications and ballots, and comprehend all the unlawful

(Appellate jurisdiction.)

acts of every election board. In this instance, 120,000 votes were polled in 266 precincts; now, it is simply impossible that two, nay, all the fifty petitioners, could personally know the facts necessary to contest the poll of the entire city. The legislature did not mean this vain thing; *lex non intendit aliquid impossibile; lex nil facit frustra—nil jubet frustra*. It is the duty of a court to construe a statute, if possible, *ut res magis valeat quam pereat*. *Huber v. Reily*, 53 Penn. St. R. 115, 117. These principles have been stated with much force, and with reference to the highest authority, in *Schuylkill Navigation Co. v. Loose*, 19 Penn. St. R. 18–19. The case comes then to this point; the oath must be made from credible information, or not at all; in the poll of such a city, the affiant cannot swear to more than to the best of his knowledge and belief; it would be an imputation on the framers of the law to think otherwise. The argument that no indictment would lie for perjury upon this form of oath, is fallacious; if the oath mean an oath in this form, then the oath in that form is an oath authorized by law, and an indictment for its corrupt and wilful breach will lie.

We must consider also the tribunal to hear and decide on the petition. It is a high constitutional court, competent to decide on its own jurisdiction; its jurisdiction being exclusive and final, it necessarily decides it for itself. There was no omission of anything to confer jurisdiction; the petition came from the requisite number of qualified voters, was presented in due time, and its truth was sworn to by two of their number; the court having a rightful and general jurisdiction over the subject of the petition, assumed it, heard the proofs, found the facts alleged to be actually true, and set aside the return as false. Now, after a decision on the merits, which have been established on sufficient evidence, can we oust the jurisdiction, for an alleged error in the interpretation given to the language of the oath? This would be dangerous ground to take. The law does not prescribe the form of the oath; it cer-

(Appellate jurisdiction.)

tainly was for the court, in judging of its own jurisdiction, to interpret the words of the affidavit; it did so, heard the case, found the facts to be true, and decided on the merits. See Carpenter's Case, 14 Penn. St. R. 486; Overseers of Tioga v. Overseers of Lawrence, 2 Watts 43; Plunkett's Creek Township v. Fairfield Township, 58 Penn. St. R. 209.

The question as to the power of the city recorder to administer the oath, stands on the same footing; it was a question which the court below necessarily decided for itself. There was an oath actually taken and certified; the officer certifying it had power to administer oaths; his commission was conferred by the governor, by and with the consent of the senate, for a term of years and during good behavior; his character is also recognised as magisterial. Rhodes v. Commonwealth, 15 Penn. St. R. 277. By the act of 1817, he has authority to take proof of deeds and other writings, and to issue writs of *habeas corpus* and give relief thereon, as fully as the president of the common pleas; these powers imply his authority to administer oaths, without which he could not swear the witnesses. The act of 31st March 1860, punishes perjury committed upon an oath taken before the recorder, classing it with oaths taken before any judge, justice, alderman, &c., before whom oaths may be taken. The court of common pleas had decided also, that he had the authority to administer oaths. Schuman v. Schuman, 6 Phila. 318. Thus, being a commissioned officer, and having power to administer oaths, by his certificate of probate to the petition, he asserted his authority to administer that oath; *primâ facie*, therefore, the oath was regularly made and being accepted, was before the court.

The court having a general and rightful jurisdiction over the subject of the petition, assumed it, and in so doing, decided the affidavit to be sufficient; it is not the case of the absence of any affidavit, but is the case of an affidavit *primâ facie* regularly made. Now, after having possession of the case in a manner clearly legal and regular,

(Appellate jurisdiction.)

at least, to a *prima facie* extent, and after having heard the case on its merits, and found the truth of all the facts necessary to a case on the merits, how can we go behind the certificate of the recorder, to inquire whether his conceded authority to administer oaths extends to this proceeding? The oath was only necessary to initiate the proceeding, which has now been proved, by sufficient evidence, to be well-founded and true; if we can go behind his certificate, after a decision on the merits, no proceeding is safe; we may as well inquire whether all the petitioners were qualified voters, and if we find one disqualified by non-residence, non-payment of taxes, or a defect in his naturalization certificate, set aside the whole proceedings. This would be a dangerous doctrine, and opposed to the principles decided in the cases just referred to.

The correctness of the oath in these cases is supported by that required to contest the election of the governor, members of assembly, judges, county officers, &c., to wit, that the "facts stated in this petition are true, to the *best of their knowledge and belief*." It cannot be supposed, the legislature meant to exact severer terms in order to contest an election of city officers; indeed, to require an impossible condition. But analogies are appealed to; it has been decided, that an appellant from an award must swear that he *firmly* believes injustice has been done, and less will not suffice; this is true, but the difference lies between *knowledge* and *belief*; it is not unjust to require of a suitor, knowing his own case, a firm belief of injustice; on the other hand, suppose we were asked to say, that the appellant must swear to the absolute truth of injustice, and thus compel an ignorant man to swear to the law as well as the facts? This would be unreasonable; and it is quite as unreasonable to ask a man who cannot know all the facts, to swear absolutely to the illegality of voters, for whom they voted, the law of residence, of suffrage, and of the duties of election officers, and all else that is necessary to actual knowledge of an undue election.

(Appellate jurisdiction.)

Nor is the argument good, that the act of 1806 requires the direction of the act of 1854 to be strictly pursued. Before a statute can be pursued, we must know what it requires; if the law require personal knowledge, the oath must be so; but this is the very question to be decided, and it is illogical to tell us it means personal knowledge, because it must be *strictly* pursued. What does the act of 1854 require? personal knowledge of every fact averred, or only knowledge to the best of reliable information and belief? If personal knowledge be not required, that ends the question; and all the numerous authorities cited, to show how strictly a statute must be pursued, are inapplicable.

Nor can the petition be likened to a response in chancery; it is not a proceeding to *compel* a discovery of facts *known* to the party, but is simply a complaint to initiate an inquiry in good faith. Its foundation can be reliable information only, and therefore, not absolutely, but credibly true. In conclusion, on this, the only serious question, we have ample authority so to construe the act. "As to the construction of statutes, it is certain, that they are not always to be construed according to the letter." *Bank of North America v. Fitzsimons*, 3 Binn. 356. "Acts that give a remedy for a wrong, are to be taken *equitably*, and the words shall be extended or restrained according to *reason* and *justice*, and according to their *end*, though the words be short or imperfect." *Schuylkill Navigation Co. v. Loose*, 19 Penn. St. R. 18; citing 2 Inst. 152, 249, 395, 572, and Hob. 157, 299. The word "void" has been held to mean "voidable;" *Braddee v. Brownfield*, 2 W. & S. 280; "or" to mean "on;" *Levering v. Railroad Co.*, 8 W. & S. 463; "or" has also been held to mean "and;" *Foster v. Commonwealth*, *Ibid.* 79-80.

Was the jurisdiction lost by the expiration of the term, in the case of the prothonotary? In this respect the law is directory only; the act to be done is judicial, and not ministerial. The court cannot "proceed on the merits"



(Appellate jurisdiction.)

of the contest, without time to take the testimony, and to hear and decide; if the testimony be voluminous, as it must be to correct so large a poll, the merits cannot be reached without time, nor can the merits be reached, if delayed, as here, by dilatory motions. It would be a harsh construction, to defeat its own purpose, by requiring an impossibility of the court; analogies are against it. *Commonwealth v. Sheriff*, 16 S. & R. 304; *Ex parte Walton*, 2 Whart. 501; *Commonwealth v. Jailer*, 7 Watts 366; *Clark v. Commonwealth*, 29 Penn. St. R. 129. In these cases, a similar limitation was held not to oust the jurisdiction of the court, and it was said, "there is no doubt that necessity, either moral or physical, may raise an available exception to the statute." The act of 1810 requires *certioraris* to justices of the peace to be decided "at the term to which the proceedings are returnable;" yet, what lawyer ever heard that a *certiorari* fell with the expiration of the term? It would be a mockery of justice, were the people to be told, when seeking redress against dishonest servants, that the voice of the judge is silenced in the midst of his sentence, or the uplifted arm of the law struck down, by the stroke of the clock; the matter has been well stated by Allison, J., in *Stevenson v. Lawrence*, 1 Brewst. 134-5 (ante 532).

The next head is the alleged errors of procedure. The power of the quarter sessions to appoint an examiner is questioned; this affects the case of the district-attorney only. The constitution and power of the court of quarter sessions, under the organizing act of 16th June 1836, leave no doubt of its power to take depositions, and consequently, to appoint examiners for this purpose; this is the practice in road and pauper cases. The quarter sessions is classed with the other courts, in this act, in respect to many of its powers; and the 21st section enacts that "each of the said courts shall have full power and authority to establish such rules for regulating the practice thereof, and for expediting the determination of writs, causes and proceed-

(Appellate jurisdiction.)

ings therein, as, in their discretion, they shall judge necessary or proper, provided that such rules shall not be inconsistent with the constitution and laws of this commonwealth." This, being an enabling act, is to be liberally construed; the power to establish rules for all cases, embraces the power to make a rule in a particular case; *omne majus continet in se minus*.

The next error of proceeding alleged, is the allowance of the amendment in the cases of the district-attorney and prothonotary; this was not error, but fell within the sound discretion of the court. The grounds of allowance are not in the record, and cannot be reviewed by us; the amendment was not of an omitted prerequisite to confer jurisdiction, nor of a matter essential to the frame of the petition, but was a mere specification of a fact comprehended within the general terms of the complaint, and belonging only to the proof. The miscount of 40 votes for Sheppard which belonged to Gibbons, occurred at the same election, entered into the same general returns and affected the result; the matter pertained to the same case and was necessary to determine it "on its merits."\* The power of amendment exists at common law, falls within the discretion of the court and cannot be reviewed; to the numerous authorities cited by the defendant in error, we may add *Grove's Appeal*, 37 Penn. St. R. 443; *Cambria Iron Co. v. Tomb*, 48 Ibid. 388; *Keen v. Hopkins*, Ibid. 445; *Boyd v. Negley*, 40 Ibid. 377; s. c. 53 Ibid. 387; *Pennsylvania Railroad Co. v. German Lutheran Congregation*, Ibid. 445. And in point of reason, why should the court not have power to amend in a contested election case? it is a judicial remedy, and concerns important rights. On what ground should the cause of the people be held so strictly, that a mere specification of facts, within the same general complaint, relating

\* The amendment in this case was suggested by the court and allowed, after the testimony had been closed, the case fully argued, and the court had delivered its opinion upon the merits! This amendment entirely changed the result.

(Appellate jurisdiction.)

to the same contest and the same results, should not be allowed, in order to reach the very "merits" the court is ordered to try. It does not appear from the record, that the matter was illegal, or was objected to, or that surprise was alleged, or that it was matter not developed in the testimony.\* The right of a court to make an order, necessary to the justice of the case, *nunc pro tunc*, cannot be questioned; in *Fitzgerald v. Stewart*, 53 Penn. St. R. 343, a power was supported, to enter judgment, *nunc pro tunc*, six months after verdict, in an action of slander, to prevent an abatement of the suit by the death of the plaintiff, and after motion for a new trial, in arrest of judgment, and to abate the writ; in *Slicer v. Bank of Pittsburgh*, 16 How. 571-9, a judgment, *nunc pro tunc*, was entered in 1836, to support a sheriff's sale made in 1820, and was sustained upon numerous authorities.

The last head is that concerning the frame of the complaint. The refusal of the court to quash the petition is not a ground of error; their jurisdiction is entire and exclusive, and a motion to quash is a matter of discretion. *Respublica v. Cleaver*, 4 Yeates 69. In this court, there can be but one inquiry, whether the petition be sufficient in its frame, and set forth a proper ground of contest? We shall do the plaintiffs in error full justice, in permitting the assignments of error to stand as an exception to the sufficiency of the petition. Like an indictment, a bill in equity or a libel, when the record of it is before us, we can only inquire whether it sets forth a sufficient charge or complaint. The evidence in support of the charge is a different matter, and need not be set forth or specified; the law does not demand it and no analogy justifies it. Indeed, the reverse is true, for the court is required to "proceed on the merits thereof," indicating thereby that the proceeding is not to be embarrassed by technicalities; then why should an election petition have

\* How could it, when the testimony was not before the court? but it did appear, at what time it was allowed.

(Appellate jurisdiction.)

more precision than other complaints at law, civil or criminal? The remedy to set aside an undue or fraudulent election, is as important as remedies for other injuries; if the life, liberty, property and happiness of the citizen demand certainty to a common intent only, why should a contested election require more? indeed, the nature of the subject demands even less. The innumerable frauds abounding in an election where 120,000 votes are polled, in 266 precincts, render a minute specification impossible within ten or twenty days; the only safe course, in such a case, is, to proceed in analogy to the practice in other cases, by a notice of particulars, ordered and governed by the discretion of the court. It would be an intolerable technicality, if the petitioners were required to set forth in their complaint, within ten days after the election, every illegal vote, every illegal act of the election boards and every instance of fraud; such a nicety would prevent investigation and defeat the remedy itself. The general rule in all pleadings is, that certainty to a common intent only is required. Heard's Steph. Pl. 380.

The early decisions in this city were too stringent.\* A much truer exposition of the law, and one to be adhered to, is found in the opinion of the late Judge Thompson, in *Mann v. Cassidy*, 1 Brewst. 26-7; as remarked by him, "the rule must not be held so strictly as to afford protection to fraud, by which the will of the people is set at naught, nor so loosely as to permit the acts of sworn officers, chosen by the people, to be inquired into, without adequate and well-defined cause." We find many analogies to guide us. "The general rule in all indictments," says Sergeant, J., "is, that the charge must be positively averred; but in what cases it is, or is not, sufficiently

\* It must be borne in mind, that this decision was made by a bare majority of the court; and in testing the value of such a precedent, the relative ability of the dissenting judges is an important element of consideration. Chief Justice Thompson and Mr. Justice Sharswood dissented from the views of the majority. The principles here condemned are those of that eminent jurist Judge King.

(Appellate jurisdiction.)

averred, is not ascertained with precision, and must be left, in a great measure, to the legal discretion of the court; certainty to a common intent in general only is required, and not certainty in every particular." *Sherban v. Commonwealth*, 8 Watts 212. Whether a bill of particulars or specification of facts shall be required, is exclusively in the discretion of the presiding judge. *Whart. Cr. L. § 291*, citing *Commonwealth v. Giles*, 1 Gray 466; *Regina v. Kendrick*, 5 Ad. & Ellis 49; *Rex v. Hamilton*, 7 C. & P. 448; see also *Commonwealth v. Hunt*, 4 Met. 125. In a libel for divorce, it was held, that the proper practice is, to give notice that, between two specific dates, acts of cruelty, &c., are intended to be proved. *Steele v. Steele*, 1 Dal. 409; see also *Garrat v. Garrat*, 4 Yeates 244.

There are many cases, at common law and under statutes, where the description is general, and because of the multitude of particulars constituting the offence or complaint, the prosecutor may be required to give notice of the acts intended to be proved. Thus, in the case of a common barrator, 1 Russ. Cr. 185-6; 2 Hawk. P. C. c. 25, § 59; and disorderly-houses, houses of ill-fame, and gaming-houses, *Whart. Cr. L. § 289*; tippling-houses, *Commonwealth v. Baird*, 4 S. & R. 141; lottery tickets, *Commonwealth v. Gillespie*, 7 S. & R. 469; timber trees, *Moyer v. Commonwealth*, 7 Penn. St. R. 439. The court remarked, in the last case, that the legislature never intended that an indictment for cutting timber trees should be so special as to defeat the end proposed. We may refer also to the case of *Barker v. Commonwealth*, 19 Penn. St. R. 412, for using vulgar and obscene language to crowds; and *Commonwealth v. Mohn*, 52 Ibid. 243, the case of a common scold; and see *Edge v. Commonwealth*, 7 Ibid. 277; and *Commonwealth v. McKisson*, 8 S. & R. 420.

In view of this array of cases, affecting the highest absolute rights of individuals, it is impossible to affirm such a stringent rule as we are asked to apply to contested election cases, or to say, that this petition is so fatally de-

(Appellate jurisdiction.)

fective in its frame that it should have been quashed on motion, or set aside on demurrer. It sets forth in befitting terms, the general election of 1868, the persons voted for, the number of votes returned for each, and the majority for the persons returned; charges an undue election and false return, alleges the election of the opponent, and sets forth the grounds of the illegality of the election. It charges that the officers of the election fraudulently conducted and carried on the election, with a wilful disregard of all the requirements of the law; and then specifies their various fraudulent acts, by means of which the fraud was perpetrated, and illegal votes suffered to be cast for the persons returned. Here, I may notice in passing, the omission to set the letter V opposite the names of the electors who had voted; this is specified in the petition as one of the fraudulent acts of the election officers, and not as a cause, in itself, sufficient to set aside the election. The petition then avers that all these acts were done and committed, with the intent and purpose of holding an undue election, and to prevent an honest expression of the popular will, and a true ascertainment of the real votes of the qualified voters; and that in pursuance of this conduct, the popular will was not ascertained, but was defeated, whereby the election was rendered false, fraudulent, undue and void, and the return void, and should therefore be disregarded. The petition does not close here, though much more descriptive and certain than most forms of indictment, petition and libel, but proceeds to specify the number of fraudulent votes received in the several divisions, describing them specially, numbering, in the aggregate, several thousands, and largely more than sufficient to overthrow the majority for the person returned as elected. Here is certainty, not only to a common, but to a very specific intent; how can a petition so specific in its charges, and minute in its specifications, be decreed to be defective in its frame? Strong bias only can entertain a doubt of its sufficiency.

(Appellate jurisdiction.)

The argument, that the claim of the petition to have certain returns stricken out, makes it defective or unsound, is wholly unfounded. If the facts set forth are sufficient, as we have seen they clearly are, the prayer to strike out does not vitiate the charge of an undue election and false return; that charge remains, especially in view of the concluding prayers of the petition, which are strictly correct and cover the entire ground of the case. The prayer to strike out is no part of the charge in the complaint; the court may disregard it, if unfit, if too broad, if unsupported by evidence, when there are prayers suitable to the case and covered by the evidence; and we are bound to believe they did disregard it; *omnia præsumuntur legitime facto, donec probetur in contrarium*. The court having exclusive and final jurisdiction, we have no right to presume that it abused its powers; the evidence, calculations and opinion of the court, as we have seen, are not before us; we cannot judicially know whether the court struck out divisions, or merely found frauds sufficient to change the result; we know only the decree, and that is clearly right. The whole argument upon the power to strike out polls is outside of the record before us.\*

And even if it were conceded, that the prayer to strike out was a defect in itself, yet, the decree cannot be affected by it. The presumption now is, that, if illegal, the court

\* It will be seen, that the court skilfully *evaded* the main question in the cause; in point of fact, the court below *did* strike out the return of entire polls, as prayed in the petition. The effect of this was, to decide the cause in favor of the candidate attached to the same political party as the majority of the court, who was so clearly defeated at the polls, that the court below was compelled, on a rehearing, after the record was remitted, to declare his competitor duly elected. In his dissenting opinion, Chief Justice Thompson very forcibly argues, that the judgment of the court below must be presumed to have followed the *allegata* of the complaint; that contained a prayer that, for certain violations of the law on the part of the election officers, certain entire polls might be stricken out from the general return; and it is difficult to see the force of the learned judge's argument that there was nothing before the supreme court to show whether the court below had done so or not. See 1 Brewst. 196.

(Appellate jurisdiction.)

disregarded it; this is supported by authority; thus, in *Hazen v. Commonwealth*, 23 Penn. St. R. 355, this court held, upon an indictment of eleven counts, where, after a motion to quash was refused, a general verdict of guilty was rendered on ten of the counts, and judgment arrested on two, that the judgment upon the remaining eight would not be reversed, if any count were sufficient, and the first was found to be good. The same had been decided in *Commonwealth v. McKisson*, 8 S. & R. 420; and in *Hartmann v. Commonwealth*, 5 Penn. St. R. 63, *Burnside and Bell, JJ.*, said in argument, "the law of Pennsylvania is settled, that if one count be good, it is sufficient;" so also, as to several matters contained in the same count. In *Cotteral v. Cummins*, 6 S. & R. 348, Justice Duncan said, "it is the law, that where several matters are laid in the same count, part of which is not actionable, or not actionable in the form laid, if there are sufficient facts to support the action, it will be intended, after verdict, that damages were given only for such as were properly laid." The same is said in 1 Chit. Pl. 682, and the reason given, that the verdict will be sustained by the intendment and presumption that the judge duly directed the jury, not to find damages on the defective allegations. The same intendment was made in *Weigley v. Weir*, 7 S. & R. 310, the court remarking, that it is not to be presumed, the judge would direct, or the jury would have given the verdict, without sufficient evidence of the breach of the contract; the defect was, therefore, cured by the verdict. There are many analogous cases; *Stoever v. Stoever*, 9 S. & R. 454-5; *Kerr v. Sharp*, 14 Ibid. 399; *Turnpike Co. v. Rutter*, 4 Ibid. 6; *Sedam v. Shaffer*, 5 W. & S. 529; *Corson v. Hunt*, 14 Penn. St. R. 510; *Seitz v. Buffum*, Ibid. 69. In this case, the intendment should be even stronger, for the court being the exclusive judges of the facts as well as the law, we cannot suppose the decree was rendered on incompetent or insufficient evidence. "The courts make every reasonable presumption to rid themselves of



(Appellate jurisdiction.)

objections which do not touch the merits;" per Rogers, J., *Seitz v. Buffum*, *supra*.\*

Thus, it is evident, from this array of authority, no presumption can be drawn from the decree, that the court struck out divisions, because such a prayer is contained in the petition; the decree itself furnishes no such evidence, while the prayer, if illegal, we must now presume, was disregarded, upon the legal intendment the cases all say should be made. The argument, therefore, founded on the decree following the *allegata et probata* is a *non sequitur*, and illogical; the *probata* are not before us, while the *allegata* are not presumed to be followed, contrary to law. But, in addition to this general principle, we have an authority in point; in *Ewing v. Filley*, 43 Penn. St. R. 384, it was held, that the proceedings could not be reversed because of contradictory averments in the specifications, but the proper course would have been, to move the court below to strike out the contradictory part; and the *certiorari* was quashed. There was no motion in the present cases to strike out this prayer as illegal; the only motion was to quash.

Upon the whole record, in these cases, we discover no error, and the several decrees are, therefore, affirmed.

Decrees affirmed.

THOMPSON, C. J., and SHARSWOOD, J., dissented.

---

This case is undoubtedly authority for the principal point decided, namely, that the supreme court has jurisdiction to review the regularity

---

\* A labored argument, abounding in generalities, but which must fail to convince the understanding of any really learned man. It is well understood that the majority of the court were compelled to assume this illogical position, by the refusal of one of their number to join in an affirmation of so much of the decree of the court below, as rejected entire election polls, for the reasons set forth in the petition. It is to be regretted that the plan of this work compels the omission of the able dissenting opinion of the Chief Justice.

(Appellate jurisdiction.)

of the proceedings of the court below, in a case of contested election, but not to re-try the case upon the merits. Its authority, however, upon the other questions involved, is much weakened by the able dissenting opinion of the Chief Justice, and the acknowledged great ability of the dissenting judges. It is always to be regretted, that a court should be divided politically, upon a contested election case, and that the decision should be in favor of the candidate of the political party to which the majority of the court are attached; it necessarily weakens the authority of the case as a precedent.

It was early decided in Pennsylvania, that the jurisdiction of the supreme court over the proceedings of the court of quarter sessions, in a contested election case, was revisory only, and that a *certiorari* would not lie to remove the proceedings in a case then pending and undetermined. *Wallington v. Kneass*, 15 Penn. St. R. 313. And in *Carpenter's Case*, 14 *Ibid.* 486, it was held, that the general revisory power of the court, to correct errors apparent on the face of the record, had been taken away by the act of 1839, which declared that the action of the court below should be final; and a writ of *certiorari* issued in that case was, accordingly, quashed. This was followed by *Scheetz's Case*, in which the supreme court, on the 14th April 1853, were divided on the question of overruling *Carpenter's Case*, and sustaining the writ; Black, C. J., and Lowrie, J., being in favor of affirming the former decision, and Lewis, J., and Woodward, J., for overruling it, so far as to sustain the writ, for the purpose of examining into the regularity of the proceedings of the court below, but not to rejudge the merits; Gibson, J., by whom the opinion in *Carpenter's Case* was delivered, being absent at *nisi prius*. The latter opinion has been finally established as the doctrine of the supreme court, and was followed in *Chase v. Miller*, 41 Penn. St. R. 403 (ante 214), and *Ewing v. Thompson*, 43 *Ibid.* 372, as well as in the principal case. And see *Commonwealth v. Garrigues*, 28 *Ibid.* 11; *Powers v. Reed*, 19 Ohio St. R. 189. If, however, the record do not show on its face, sufficient ground for the issuing of a writ of *certiorari*, it may be quashed on motion. *Ewing v. Filley*, 43 Penn. St. R. 384.

In Ohio, the judgment of the common pleas in a case of contested election, is reviewable in the supreme court. *Lehman v. McBride*, 15 Ohio St. R. 573. In Illinois, under a similar statute, which provided that the decision of the circuit court in a case of contested election

(Appellate jurisdiction.)

should be final, the supreme court held, that their appellate jurisdiction was absolutely taken away, and that a writ of error issued in such a case must be dismissed. *Moore v. Mayfield*, 47 Ill. 167; *People v. Smith*, 51 Ill. 177. In Missouri, on an appeal, there is a trial *de novo* in the circuit court. *Boggs v. Brooks*, 45 Mo. 232.

The statutes, however, giving jurisdiction to municipal corporations to try contested elections of their own members, have been held not to oust the jurisdiction of the supreme court, to inquire into the legality of their proceedings, by granting an information in the nature of a writ of *quo warranto*. *Commonwealth v. McCloskey*, 2 Rawle 369 (ante 196). But the contrary was decided in *Commonwealth v. Leech*, 44 Penn. St. R. 332, and in *Commonwealth v. Garrigues*, 28 Ibid. 9. The same principle was involved in *Commonwealth v. Small*, 26 Penn. St. R. 31. And in New Jersey, as early as 1794, the right of the supreme court, without any statute, to examine into the proceedings of an election, and if illegal to declare it void, was asserted in an able opinion by Chief Justice Kinsey, in *State v. Justices of Middlesex*, Coxe 244. This case, however, is said, in a note, to have been reversed on error before the governor and council, by a vote of 8 to 3, on the ground of want of jurisdiction.

## GIBBONS v. SHEPPARD.

In the Court of Quarter Sessions of Philadelphia.

MARCH SESSIONS 1870.

(REPORTED 2 BREWSTER 117.)

[*Rehearing.*]

Where, in a contested election case, there was a decree for the contestant, whereupon the other party filed his petition, praying for a rehearing, on the ground of an erroneous computation of the votes, on the basis settled by the opinion of the court, and pending this petition, the cause was removed to the supreme court, by *certiorari*, where the decree was affirmed, the court being of opinion that the computation of the court below was not brought up with the record: it was held, that after the record had been remitted, the court below had power to hear the petition and correct any errors of computation in their decree.

In purging the polls, illegal votes are to be deducted from the entire vote, not from the majority.

A vote, *primâ facie* illegal, must be disallowed, if the voter did not, at the time of offering it, produce the preliminary proof required by law.

This was a proceeding to contest the election of Furman Sheppard to the office of district-attorney for the city and county of Philadelphia at the general election held in October 1868.

The court of quarter sessions, on the 16th October 1869, made a decree in favor of the contestant; whereupon a writ of *certiorari* was sued out to remove the cause to the supreme court; but before any action was had upon the *certiorari*, Mr. Sheppard filed his petition for a rehearing in the quarter sessions, on the ground that there were errors in the computation of the votes for the respective parties, on the basis of the principles announced in the opinion of the court, which ought to be corrected. The court refused to disturb the decree, pending the *certiorari*; but the decree having been there affirmed, and the record remitted, the motion for a rehearing was renewed by the counsel for Mr. Sheppard.

(Rehearing.)

The contestant, thereupon, filed a bill in equity in the court of nisi prius, before Read, J., praying for an injunction to restrain further proceedings in the cause on the part of Mr. Sheppard; an *ex parte* injunction was granted, and the case came up on a motion to continue the same under final hearing.

READ, J., delivered the following opinion. The election of the second Tuesday of October 1868, in the city of Philadelphia, was fruitful of contested election cases. There was the contested election of a judge of the district court for the city and county of Philadelphia, tried and decided by a joint committee of the senate and house of representatives at Harrisburg; the elections in the 3d and 5th congressional districts were also contested in congress, one of which has been determined, and the other is still pending, if not recently decided. Besides these, there were seven contested election cases, tried before the president judge and his associates of the court of common pleas, either as holding that court or the court of quarter sessions; the contested offices were the mayor, district-attorney, city solicitor, city controller, receiver of taxes, city commissioner and prothonotary of the court of common pleas.

In the month of October 1868, petitions of qualified electors were filed in all these cases, complaining, in each of them, of a false return and undue election for the particular office. On the 14th November, motions were made, in all the cases, to quash the petitions, and were filed with reasons; these motions were argued together by Messrs. Rawle and Meredith for the contestants, and by Messrs. Hirst and Phillips for the respondents; and on the 5th December, the motion to quash was overruled, and the respondent, in each case, was ordered to file his answer on or before the 31st December 1868, on which day, all the answers were filed. On the 6th January 1869, the court appointed William P. Messick and Richard M. Batturs,

(Rehearing.)

examiners to take testimony, who, on the 11th January, entered upon their duties, and were attended by William H. Rawle, Erastus Poulson and James T. Mitchell, Esqs., counsel for contestants, and by Lewis C. Cassidy and Isaac Gerhart, Esqs., counsel for respondents; Mr. J. I. Gilbert was the phonographic reporter. The contestants' testimony commenced on the 11th January and closed on the 9th April, having occupied 37 days in actual business sittings; Mr. Mann, on the part of the contestants, and Mr. Sellers, on the part of the respondents, were present during a large portion of this time, and took an active part in the proceedings. The testimony on the part of the respondents commenced on the 3d May and closed on the 21st July, occupying 33 days, and covering 679 pages of printed matter; Messrs. Sellers, Gerhart and Fletcher, for the respondents, and Messrs. Mann, Mitchell and Donegan for the contestants. The testimony on the part of the contestants, in rebuttal, commenced on the 26th July and closed on the 31st July 1869, occupying six days. The testimony on the part of the contestants, in chief and in rebuttal, covered 901 pages of printed matter. The report of the examiners was filed on the 6th September, the court having fixed that day for the argument.

The effect of climate on legal business, is strikingly exemplified in this case. During its progress, one counsel on each side went to Europe, and on the 12th July, it was stated, in open court, by one of the counsel for the respondents, that one of the counsel was going to the White Mountains and would not return until September; another had to leave the city, by advice of his physicians; and another was in Europe; so that, if it was ordered by the court, that the cases should be discussed in August, the mayor, district-attorney and city commissioners would be in court without counsel.

The arguments commenced early in September, and continued for several days: Messrs. Mann, Strong and Meredith for the contestants, and Messrs. Sellers, Phillips and

(Rehearing.)

Hirst for the respondents. The court took time to consider, and on Saturday the 16th October 1869, it was ordered, adjudged and decreed by the court, that at the election held in the city and county of Philadelphia, on the 2d Tuesday of October 1868, Charles Gibbons was duly elected to the office of district-attorney; similar decrees were made in the other cases in favor of the contestants, except in the case of the mayor, in which case the decree was in favor of the incumbent, and this office became no longer the subject of contest. In the six remaining cases, appeals, so called, were entered by the respondents, in each case, and writs of *certiorari* were sued out and allowed by the chief justice, at Pittsburgh on Monday the 18th October, and were filed in the proper office on the next day, Tuesday the 19th of October. These writs of *certiorari* brought before the supreme court nothing but the records, as they stood on that day. The six writs of *certiorari* were heard before a full bench, on the 27th, 28th and 29th January last; the plaintiffs above being represented by Messrs. Biddle, Phillips and Hirst, and the defendants above by Messrs. Rawle, Mann and Strong (now an associate justice of the supreme court of the United States); the argument, on both sides, was exhaustive. On Monday the 14th February, the opinion of the court was delivered by Judge Agnew, in which Judge Williams and myself entirely concurred; there was a dissenting opinion by the Chief Justice, concurred in by Judge Sharswood.

The court looked neither at the evidence nor the opinion of the court below, which were not brought up by the writs of *certiorari*, but simply at the record itself, and finding no error on its face, affirmed the decrees of the court below. Nothing subsequently to the 19th October was before them, and therefore, whatever took place afterwards was not passed upon, and was not affected by the affirmance of the decrees.

In the case of the district-attorney, within the term of

(Rehearing.)

the court at which the decree was entered, to wit, on the 28th October 1869, a petition was presented by Furman Sheppard, setting forth certain errors and omissions in the calculations upon which the decree was based, and praying to be heard to explain the same, without seeking to re-argue or to controvert any of the principles of law adopted by the court in its opinion. This petition was received and directed by the court to be filed, and a copy thereof was served upon Mr. Gibbons or his counsel; the court fixed the 30th October 1869, to hear an argument on behalf of the present plaintiff and defendant, upon the petition, on which day, both appeared in person or by counsel, and were heard upon the allegations in the said petition, whereupon the court held the same under advisement; on the 4th November, a supplemental petition was filed, by leave of the court, and a copy of the same served upon the present plaintiff or his counsel; to these petitions the present plaintiff filed answers, but suggesting no objection or exception to the right of the court to consider and determine upon the matters set forth in the said petitions; for reasons satisfactory to the court, they reserved their judgment upon the said petitions and answers.

The decree of the court of quarter sessions having been affirmed, the court took up the said petitions and answers, in order to dispose of the same, and with the knowledge and assent of the counsel of the plaintiff and defendant, assigned a day for the hearing thereof, which was postponed until the 28th March 1870, when the present plaintiff filed a paper, objecting to any further proceedings in the cause, because of the final decree of the 16th October, and because, on the 25th October, he took the oath of office, and because, the judgment of the court of quarter sessions was affirmed, on *certiorari*, by the supreme court. The court fixed Friday the 1st April, at 10 A. M., to hear the argument upon this paper, and upon the petitions and answers, of both of which petitions and answers I have been furnished with copies. On the 1st April, I



(Rehearing.)

was applied to by Messrs. McMurtrie and Meredith, and furnished with a copy of the bill in this case, and I granted the injunction, fixing the hearing for Monday the 4th inst. The hearing did not take place until Tuesday, which gave me an opportunity to consult Judges Agnew and Williams, with whom I had united in the majority opinion of the supreme court.

We all agreed, that the decision of the supreme court decided nothing, except as to what was before us, and did not affect any future legal action that might be taken by the court below. The court of quarter sessions had a clear right, within the term, to re-examine, and if necessary, to reverse their own judgment or decree. I see, that they did, within the term, allow proceedings that might lead to such a result, which were submitted to by the present plaintiff, and that those proceedings are now in progress. I am now asked, virtually, to stop the action of a tribunal, having by law an exclusive jurisdiction of the subject-matter, legally commenced, and so far as I know, legally conducted, not by direct means, but by indirection. Whether I have any such power is, at best, very doubtful; but in one thing I am clear, I will not exercise it. I have every confidence in the judges of the court below, knowing that no suitor will suffer injustice at their hands.

Injunction dissolved.

The motion for a correction of the decree was then proceeded with in the quarter sessions, and was argued before a full bench, by *Hagert* and *Biddle*, in support of the motion, and by *McMurtrie* and *Mann*, in opposition to it.

ALLISON, P. J., delivered the opinion of the court. On the 16th day of October 1869, this court decided that Charles Gibbons, at the general election held on the second Tuesday of October 1868, had been elected district-attorney for the city and county of Philadelphia, over Furman Sheppard, by a majority of 68 votes. At the same term.

(Rehearing.)

of the court, on the 28th day of October, Furman Sheppard presented his petition, which was allowed to be filed, in which it is set forth, that he had made an examination of the tables and estimates upon which the judgment of the court was based, and had discovered therein a number of omissions and arithmetical and clerical errors, to the extent of 112 votes, showing that the petitioner was duly elected district-attorney, by a majority of not less than 44 votes: the prayer is for a re-examination of the count and judgment entered thereon, and that the court will declare what is the true vote and majority of the petitioner.

This we could not have done, at that time, for the reason that Mr. Sheppard had, by *certiorari*, removed the case from this court into the supreme court; it was no longer under our control, so as to enable us to change the judgment which had been entered, further than to see that the true record was sent to the court above. We probably could have corrected a mistake apparent upon the face of the proceedings, where there was anything to correct by, or where there was a plain error in the arithmetic of the count, and to this extent, we would have felt ourselves authorized to interfere with the record, before certifying it to the supreme court, if it had been regarded as important to thus alter our judgment, pending the appeal; as these clerical errors would not have changed the result, we deemed it best to await the decision upon the *certiorari*. Further than this we could not have gone, because the writ, in effect, was a *supersedeas*; our hands were tied by the act of the petitioner, and for this reason, we paused, after the argument had upon the petition, both upon the merits and upon the law of the case, as it then stood practically removed to the court above, though the record had not, in fact, been made up and sent into the supreme court. If we had done otherwise, we would have exposed ourselves to a charge of contempt of the higher court, or our proceedings would, at least, have been void,

(Rehearing.)

after the service of the writ. 12 Mod. 384. The authorities are not entirely consistent as to the light in which our action would have been regarded in the court of errors, but they all agree that, after service and until the record is sent back, nothing can be done, except to correct a plain mistake; and this correction can only be made for the purpose of enabling the court to obey the command to send up the record, which means the correct and the true record. A misprision of the clerk, or a mistake of the court is the limit of our authority over the record after the *certiorari* has been lodged in our court; unless, indeed, the judgment has begun to be executed, before service, in which case, the execution proceeds unaffected by the *certiorari*. This, however, has no application to the case of a contested election, in which the court, who are to hear and determine on the merits, have nothing to do with the execution of their judgment; our power terminates with the judgment or decree.

The case of *Ewing v. Thompson*, 43 Penn. St. R. 377, is a conclusive authority upon this point; it was the case of a *certiorari*, allowed by the supreme court, to the judgment of this court, in the matter of the contested election of *Thompson v. Ewing*; the court say, the effect of the writ was, to stay further proceedings in the court below; originally, in fact, and now always, in theory, at least, it takes the record out of the custody of the inferior court, and leaves nothing there to be prosecuted or enforced by execution (post 577). A *certiorari*, after judgment, like a writ of error, is, in fact, a new suit; it enables him who obtains it, to aver errors in the record removed, not to re-try the facts in the court above; a judgment in it may be followed by a re-trial in the court below, if the errors in law are sustained (post 579). This principle was re-affirmed by the decision of the supreme court in the present case, the court refusing to look beyond the record, and the principles of law upon which we rendered our decision.

But it has been asserted, that our power to re-examine

(Rehearing.)

the case, and to alter our judgment upon the merits, or even to correct mistakes, is at an end, and that the prayer of Mr. Sheppard for a rehearing must, for this reason, be refused. The common law principle, that after the term at which a judgment has been entered, from which an appeal may be taken by writ of error or otherwise, it cannot be disturbed or changed, has been invoked in support of the objection. *Stephens v. Cowan*, 6 Watts 513, contains a strong assertion of this doctrine; but it is, even there, qualified to some extent. The qualification is contained in the statement, that it would be going too far, to hold, that the court may not, before any proceeding has been had upon the judgment, correct a mere mistake that has arisen, in entering it differently from what was intended, and perhaps, directed. The reason upon which the general principle is maintained, is, that it is the duty of the court in error, when they reverse a judgment, to give such judgment as the court below ought to have given; this shows that the principle is not applicable to the case before us, for the supreme court are, as they have stated, wholly powerless to correct any error of fact in a contested election. *Stephens v. Cowan* and the authorities there cited, apply to cases in which the court above can grant relief, by a correction of the judgment, which they cannot do in this case, for the cause assigned in the petition; they cannot do here, what, it is said in 7 Mod. 3, the judges are to do, "to *reform* as well as to affirm or reverse," and to do speedy justice to the parties.

In *Castle v. Reynolds*, 10 Watts 52, the doctrine sought to be applied against the petitioner, is stated thus: "a judgment obtained by trial and verdict is, except in very special cases, out of the power of the court, after the term at which it was entered;" this admits that there are special cases in which, after the term ended, the power may be exercised. In *Dyott v. Commonwealth*, 5 Whart. 80, the doctrine is laid down as applicable to a judgment in the quarter sessions, upon a verdict of guilty, and is, in some

(Rehearing.)

respects, analogous to the case of *Commonwealth v. Mayloy*, 57 Penn. St. R. 291. *Catlin v. Robinson*, 2 Watts 379, is the strongest Pennsylvania decision cited against the power of the court to go back upon its judgment, and open it for the correction of errors and mistakes; but there, three years after judgment, the rule to open was granted, and at the succeeding term after that, was made absolute; the decision of the court was, that the day of discretion was past; it was admitted, that the opening of a judgment was not matter for correction on a writ of error, and that, only for *excess* of power, such order could be annulled on error. To the same purpose are the cases of *Bailey v. Musgrave*, 2 S. & R. 220, and *Huston v. Mitchell*, 14 Ibid. 310. In *Catlin v. Robinson*, Gibson, C. J., expresses himself in very strong terms, against the exercise of the power, remarking that "the act imposing a limitation on writs of error, would be of little account, if an inferior court might do, at discretion, what a court of last resort dare not do, by the exercise of its legitimate prerogative." In *Freeman v. Tranah*, 12 C. B. 413, it is laid down, that only where delay in signing judgment arises from the act of the court, can it be entered, *nunc pro tunc*, two terms after verdict.

But admitting the full force of the principle, which is invoked as restrictive of the power of the court over a judgment, at a subsequent term, we do not think, that it is to be applied with the same strictness, if at all, to a statutory proceeding in the nature of a public inquiry, complaining of a public wrong, in which, though individual citizens are interested, the community have a much greater concern, and in which the court in error cannot correct a mistake upon the merits, committed by the court below. If relief, for this cause, cannot be given by the tribunal in which the proceeding is instituted, which alone can decide upon the testimony and enter judgment upon the facts as they find them, then, there is not only no remedy for the suitor, but what is even worse, the

(Rehearing.)

court itself is chained to its error, and cannot right itself, even when the mistake is beyond question. From such a conclusion of law, founded upon a state of facts entirely dissimilar to any which can arise in an election contest, we dissent: and if it has heretofore been thought by the court, that such fetters bound them, when an appeal was made for relief against error in fact committed by the court, it is time that such fetters were rent asunder, and the necessary freedom to correct such mistakes proclaimed. This liberty must, however, have its limits; the application, on its face, must show that it is well founded; it is strictly an appeal to the discretion of the court, and may be allowed or refused in the exercise of a sound discretion; it is a proceeding which is not to be favored, except upon the plainest exhibition of a *primâ facie* case, requiring the interposition of the court to correct an error. A contrary course tends to prolong controversy in regard to the title to office, by which the interests of the public are placed in peril; a strict adherence to rule should be required in every such application.\*

But the conclusion at which we have arrived, as to our power to reconsider and reform our decree, is not without authority to support it. In *Cannan v. Reynolds*, 5 Ellis & Bl. 301, Lord Campbell asserts a general equity jurisdiction of the court over their judgments; Coleridge, J., concurred and added, that the practice was now inveterate and of every-day occurrence, to set aside judgments, whether regular or irregular, whether after execution or before, which, he remarked, showed their jurisdiction to do this; Crompton, J., agreed that the power could be exercised, but the application must be made within a reasonable time after judgment is entered. In *Usher v. Dansey*, 4 M. & S. 94, an amendment was allowed, after judgment

\* It is difficult to understand what is meant by a strict adherence to rule, in what is just said to rest in judicial discretion; it is only another proof of the impropriety of vesting such discretionary powers in the courts, in political cases.

(Rehearing.)

given in a former term and error brought thereon, and pending error; the amendment was to correct a misprision of the clerk. The court, in the case of *Galway v. Banon, Longf. & Towns. (Ir. Exch.)* 70, allowed a petition to amend notes of decree, without withdrawing appeal. In this state, it has been held that, after error brought on a judgment of the district court or common pleas, the application for leave to amend, may be made to either of those courts, while the record remains in it, though the writ of error has been shown to the court; *Fury v. Stone*, 2 Dall. 184; s. c. Add. 114; 1 Yeates 186; the amendment was allowed on the authority of *Pickwood v. Wright*, 1 H. Bl. 643. In *Spackman v. Byers*, 6 S. & R. 385, the record was sent back for amendment; *Rhodes v. Commonwealth*, 15 Penn. St. R. 276, decides that amendments can be allowed after the term at which judgment is signed; Gibson, C. J., says, the notion to the contrary is exploded, and has yielded to necessity, reason and common sense. The court in which judgment is entered may allow amendments of the record, even after error, as between the parties. *Crutchen v. Commonwealth*, 6 Whart. 340; *Chew's Appeal*, 9 W. & S. 152. See also 1 Dall. 133-5; 5 Binn. 60; 5 Penn. St. R. 273.

These authorities make it abundantly clear, that the court possessed the most ample power to allow the petition of Mr. Sheppard to be filed; and some of them would seem to indicate, that the correction of errors and mistakes, if not a correction of the judgment, might have been made, after *certiorari*, and before the record of the cause was sent up. But the latest case, and the one strictly analogous to that which we are now considering, *Ewing v. Thompson*, holds the contrary doctrine, asserting that our proceeding would have been void, if indeed, such action would not have placed us in contempt. We were, therefore, required to rest, until the decision of the supreme court upon the case, as it was heard on *certiorari*; and we thought it but respectful and proper, that we should pause,

(Rehearing.)

while it was before Judge Read, upon a motion for a special injunction, to restrain Mr. Sheppard from further proceeding to prosecute to hearing and decree the matters set up in his petition.

The way is now clear for such action as this court, after mature consideration, has decided ought to be taken, in order to ascertain the truth of the averments contained in the petition to reform our decree. Upon the pleadings, we have nothing before us, but the original and amended petitions of Mr. Sheppard, Mr. Gibbons disclaiming, upon the last argument, in open court, all responsibility for the papers entitled, "answers to Mr. Sheppard's petitions for a rehearing," which were before the court upon the former argument; following the disavowal of Mr. Gibbons, these answers were, with leave of the court, withdrawn by Mr. Mann, who was counsel for Mr. Gibbons.\* We might, therefore, content ourselves with an examination of the matters contained in the first and second petitions of Mr. Sheppard, there being no reply or answer before the court, although the statements contained in the answers, which were considered at great length, upon the first argument, are in fact, if not in form, before us.

It was admitted by counsel representing both of the parties to the proceeding, that the purging of the polls had heretofore proceeded upon an erroneous basis; that instead of deducting the illegal vote from majorities, it should, in each case, have been deducted from the whole vote in the division, and that the mode in which the results were obtained, on the former hearing, worked to the disadvantage of the petitioner. To this error, into which counsel on both sides fell, upon which their calculations were based, and upon which their arguments were constructed, is to be attributed, in part, the result declared in the

\* Mr. Gibbons asserted in open court, that Mr. William B. Mann was not his counsel, and had no authority to file the answers, though it was notorious that Mr. Mann had acted as Mr. Gibbons's counsel throughout this protracted cause!



(Rehearing.)

former opinion of the court,\* and it is by an abandonment of this conceded mistake, and the adoption of a rule, now admitted to be the correct mode of purging a poll of its illegal votes, that a more accurate conclusion of this protracted and vexatious litigation has been reached.

Out of nearly 2000 pages of testimony, assessment lists, tally-lists and lists of voters for each election division, the manifest ignorance, bias and evident falsehood of many of those who were required to testify before the examiners, it is often difficult in the extreme, and sometimes impossible, to get at the truth of the controversy. As an illustration of this remark, it may be stated, that every calculation or table of results which has been prepared by counsel, has differed the one from the other. Upon the rehearing, we have, in effect, four statements prepared by counsel for the petitioner, two answers, afterwards withdrawn, and two statements submitted by Mr. Gibbons, each one differing in statement and conclusion. We can claim to have given to this case a most careful examination, with all these lights to aid us; in this examination, we have adhered firmly to the principles contained in the opinion of the court, which was delivered by Judge Brewster; in nothing have they been varied or departed from. We have confined ourselves to the correction of the account, where figures have been required to be placed into it, in consequence of an accidental oversight; with an abandonment of an admitted error in the mode of stating the account in purging a poll; and with a revision of our judgment, upon the evidence, as to whether votes to be received or rejected are legal or illegal votes. The strictest line of proof has been applied to every voter; and the result of the investigation will be stated, in summing up the corrected tables of the divisions to which our attention has been directed.

\* In point of fact, on the original hearing, Mr. Sheppard was *counted out*; but before this rehearing, different political ideas prevailed, and different political results were to be achieved.

(Rehearing.)

We have refused credits which have been claimed, in every instance, in which the testimony, as to voters who were *primâ facie* illegal, did not show that, at the *time* at which they offered to deposit their ballots, the offer was supported by the proof which the law demands; the vouching by election officers, without making the requisite proof, in each case, we have rejected. We hold that to enter upon the list of voters, that a voter was vouched for by a person whose name is written upon the list, is not, in itself, a full compliance with the law. In no case has a vote been counted as legal, where the proof showed, that a person who was assessed as residing at a place designated upon the assessment list, had removed therefrom before the election, unless it was established by evidence, that he had not removed from the election division.

The learned judge then proceeded to re-state the computation of the votes for the respective parties, resulting in a majority of thirteen for Furman Sheppard; and a final decree was entered that he was duly elected to the office of district-attorney.

## EWING v. THOMPSON.

In the Supreme Court of Pennsylvania.

OCTOBER TERM 1862.

(REPORTED 43 PENNSYLVANIA STATE REPORTS 372.)

[*Effect of commission.*]

Where the appointing power is in the electors, the governor has no choice but to commission the person elected, and that done, a vested right is consummated in the appointee, which nothing but judicial decision can take away or authorize the governor to recall.

If, on a decree correcting the election returns, the governor issue a new commission, the party holding it will be enjoined from interfering with the office, pending proceedings of review in an appellate court.

This was a motion for a special injunction on a bill filed by Robert Ewing against John Thompson. The plaintiff had, on the 27th November 1861, been commissioned by the governor, as sheriff of the city and county of Philadelphia; before the issuing of this commission, his election to that office had been contested by a petition filed in the court of quarter sessions of Philadelphia; which court, on the 18th of October 1862, decided in favor of the contestant, that he had been duly elected to the office. Mr. Ewing, thereupon, sued out a writ of *certiorari* to remove the proceedings into the supreme court for review. Pending proceedings in the appellate court, the governor commissioned Mr. Thompson, and on his attempting to take possession of the office, this bill was filed praying for an injunction to restrain him from so doing.

*J. E. Gowen and Hirst*, for the plaintiff.

*F. C. Brewster, Thayer and Gilpin*, for the defendant.

STRONG, J., delivered the opinion of the court. Three prominent questions are raised by this motion: they are—

(Effect of commission.)

Has the complainant a legal right to the office of sheriff of the city and county of Philadelphia? Does the defendant unlawfully invade, or threaten to invade that right? If he does, is the invasion of such a character as to call for the exercise, by this court, of its preventive power?

On the 27th day of November 1861, the governor of the commonwealth issued a commission to the complainant, reciting that by the election returns of the October election of that year, it appeared that he had been chosen sheriff of the city and county of Philadelphia, and authorizing him to perform the duties and enjoy the privileges of said office for the term of three years, from the second Tuesday of October 1861, if he should so long behave himself well, and until his successor should be duly qualified; under this commission, he entered upon the duties of the office, and he has, in fact, acted hitherto as sheriff. If this commission be still in force, beyond controversy, he has a legal right, not only to the office, but to its undisturbed enjoyment; this we do not understand to be controverted. The next stage of the inquiry, therefore, is, whether anything appears which invalidates the commission. The defendant produces a commission from the governor to himself, dated the 21st October 1862, reciting that it appeared from the returns of the same election, held in October 1861, that he had been chosen sheriff of the said city and county, and authorizing him to hold, exercise and enjoy the said office of sheriff, with all its rights, fees, perquisites, emoluments and advantages, and to perform all its duties, for the term of three years, to be computed from the second Tuesday of October 1861, if he should so long behave himself well, and until his successor should be duly qualified. The two commissions are for the same office, for the same term, and both recite the same election returns; the second does not profess to be founded upon any amended return; it makes no allusion to any contest of the election; and it does not, in terms, revoke, annul or supersede the commission previously

(Effect of commission.)

issued to the complainant. What, then, is its legal effect?

Had there been no contest of the election of sheriff, or of the election returns, it could not be maintained, that the commission issued in October 1862, annulled, vacated or superseded the commission given to the complainant in November 1861. The power of the governor to revoke a commission once issued to an officer, not removable at the pleasure of the governor, may well be denied; even where he has the power of appointment of such an officer, an appointment once made, is irrevocable; much more, it would seem, is a commission issued by him incapable of being recalled or invalidated by himself, when the appointing power is located elsewhere, and when his act, in issuing the commission, is not discretionary with him, but is only the performance of a ministerial duty. Under the constitution, the governor does not appoint a sheriff, and he has no choice as to whom he will commission; the appointment is made by the electors, and it is the duty of the chief executive to commission the person whom they have designated according to the forms of law; when he has done that, his duty is performed, and a vested right is consummated in the person commissioned, a right which nothing but judicial decision can take away or authorize him to recall. The observations of the supreme court of the United States in *Marbury v. Madison*, 1 Cranch 137, bear forcibly upon this subject; that was an application for a *mandamus* to compel the delivery of a commission for an office to which the applicant had been appointed by the president of the United States, and for which a commission had been made out but not delivered; the office was one which the law created, and of which it fixed the duration of tenure by the officer, but under the constitution, the president had the appointing power. Chief Justice Marshall, in delivering the unanimous opinion of the court, made the following observations: "Where an officer is removable at the will of the executive, the circumstance

(Effect of commission.)

which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested, if still in the office; but where an officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled; it has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made; but having once made the appointment, his power over the office is terminated, in all cases where, by the law, the officer is not removable by him; the right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it." In that case, it seems to have been held, that neither the appointment nor the commission could be withdrawn.

The executive may, undoubtedly, be authorized by law to revoke a commission, or supersede it for cause, though he have not the power of appointment, and though the duration of the tenure may be determined by the legislature. Whether he could, when the tenure, as well as the mode of appointment, is defined by the constitution, is perhaps not so clear, unless the commission has issued to one who was not elected or appointed. But the law has made the return the only evidence of an election, in the first instance, and conclusive until it has been corrected or shown to be false by a judicial determination. The defendant cannot stand, therefore, on his commission alone; he is compelled to show that the executive was authorized to issue it, before he can contend successfully that it has superseded that previously granted to the complainant. This brings us to inquire whether the proceedings which have taken place in the court of quarter sessions empowered the governor to grant the commission, and thereby supersede that which was issued upon the original election return. These proceedings are not referred to in the second commission, but if they conferred a power, the

(Effect of commission.)

commission must be held to have issued under it, rather than to be void.

Prior to the date of his commission, a contest of the complainant's election and of the return thereof, had been initiated in the court of quarter sessions, under the provisions of the act of assembly of 2d July 1839, and in that contest, a decree was entered on the 18th day of October 1862, that the complainant was not elected, but that the defendant had received a majority of the votes given, and that he was duly elected; on the same day, a *certiorari* was sued out of this court by the complainant, to remove the record of the contest in the court of quarter sessions, and it was served. The effect of that writ was, to stay further proceedings in the court below, and to remove the record of the case into this court. That such is the effect of a *certiorari*, except in cases where the legislature has made a different rule, is the doctrine of all the cases; it is not itself a writ of *supersedeas*, but it operates as one by implication; originally, in fact, and now always, in theory, at least, it takes the record out of the custody of the inferior court, and leaves nothing there to be prosecuted or enforced by execution. Very many of the English as well as the American authorities are collected in Patchin v. Mayor of Brooklyn, 13 Wend. 664; there are very many others, all holding a common law writ of *certiorari*, whether issued before or after judgment, to be, in effect, a *supersedeas*; there are none to the contrary. In some of them it is ruled, that action by the inferior court, after the service of the writ, is erroneous; in others, it is said to be void and punishable as a contempt; they all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it; that the judicial proceeding can progress no further in the lower court. It is not so clear, either in reason or in authority, that collateral action is erroneous or void; if an execution has been issued upon a judgment, before the service of the *certiorari*, the power of the sheriff to go on, under the execution, is not

(Effect of commission.)

suspended; it requires a formal *supersedeas* to suspend it; the court may even issue a *venditioni exponas* to enable its completion. An execution issued after *certiorari* served, is erroneous, and perhaps void, because its issue is the act of the court to which the superior writ has been sent, and the party whose further proceeding has been stayed.

An election contest is, in some respects, peculiar; true, it is a judicial proceeding, but, so far as the court, in which it is conducted, is concerned, it terminates with the judgment or decree; no execution of the decree is entrusted to the court or is under its control. When the truth of the return is contested, the duty of the court is, to ascertain what should have been the true return and declare it; then its duty has been done. The regularity of its proceeding may be revised in the superior court, and no doubt, a *certiorari* removes the record in such a case; it cannot, however, operate upon the inferior court as a *supersedeas*, for, after a decree, there is no possible action of the court to be stayed. If it stays anything, it can only be the action of the executive in issuing a new commission, in view of it, rather than upon it, or action under the new commission, when issued, by the substantial party to the decree, in whose favor it has been made. But the issuing of a commission by the executive, after the service of a *certiorari*, is not disobedience to the writ, for that goes only to the judges; it is not, therefore, a contempt, as action by the judges and the parties would be; he is no party to the contest, either in form or substance. In reason, therefore, there is an obvious difference between the effect of a *certiorari* upon the court to which it is sent, or the parties to the judicial proceeding removed, and the executive, who has no connection with the record; nor do the authorities show that a *certiorari* operates upon any other than the court and parties.

We are, therefore, not prepared to hold that, on the 21st day of October 1862, after the decree declaring what was the true result of the election had been made in the court



(Effect of commission.)

of quarter sessions, the executive had not authority to issue a commission to the defendant; especially, are we not prepared so to rule, upon this motion, which is an appeal to our judicial discretion, while we are sitting only at *nisi prius*. The commission of the defendant is not necessarily invalid, because the election contest is pending, in the sense in which a cause adjudicated in an inferior court is said to be pending, after its removal by *certiorari* or writ of error to a court which is superior; had it issued one day before the service of the *certiorari*, but after the decree of the court of quarter sessions, and had the officer commenced his duties, no one will contend that it would have been avoided or interrupted by the mere subsequent service of the writ, any more than an execution partly executed is stayed by the service of a *certiorari* on the court which had awarded it; and yet, had the *certiorari* sued out by the complainant been four days later than it was, the election contest would be a pending proceeding, just as truly as it now is. A *certiorari* after judgment, like a writ of error, is, in fact, a new suit; it enables him who obtains it to aver errors in the record removed, not to re-try the facts in this court; a judgment in it may, indeed, be followed by a new trial in the lower court, but there is no re-trial here. It is not on that account—not because the action may, in this sense, be said to be pending—that proceedings are stayed in the court where the trial was had, but it is because, in contemplation of law, its record is removed to another tribunal.

But while we do not hold that the *certiorari* served on the court, took away from the executive the power to issue the commission to the defendant, after the decree correcting the election returns (a power which the decree unimpeached gave him), we do hold that the service of the writ affects the defendant. He was a party to the contest in the quarter sessions, not in name, but in substantial truth; it was his right which was in controversy, and his were the fruits of the decree; upon him, therefore, the

(Effect of commission.)

*certiorari* may operate. When it was served and the record was removed, he had not begun to execute the duties of the office nor to act under the decree and his commission; his position is like that of a party who has an execution in his hands not delivered to the officer, when the writ comes and stays his further proceedings; his title to his commission is not taken away, but his right to proceed under it is suspended until the final decision under the revisory writ. It may be, that the decision of the supreme court, on the hearing of the *certiorari*, will result in setting aside the decree of the court of quarter sessions, and thus leave the original return and the commission of the complainant in full force; on the other hand, if the decree be affirmed, the right of the defendant to his commission and to the emoluments of the office, from the 21st day of October last, will be established; his title will then have commenced at the date of his commission; it does not, however, give him a present right to assume the office or interfere with its duties.

The second question is easily answered in the affirmative; the bill and affidavits show that there has been, and still is, a disturbance of the rights of the complainant, made by the defendant, no doubt under a belief of right, but still unlawful.

The remaining inquiry is, whether the case is such a one as requires the court, in the exercise of its equity powers, to grant an injunction. It is a bill preferred by an individual, asserting a personal right invaded; yet it is not to be overlooked, that it affects public interests; the office of sheriff is a most important one, and the question, which of two persons claiming it may lawfully perform its duties, is one in which the whole community is interested. We ought not to leave the matter in doubt. Though we cannot now determine finally who has the right, we can and ought to determine who is the sheriff in fact, and prevent a conflict, until there shall be an

(Effect of commission.)

adjudication that shall terminate finally the election contest. We, therefore, feel constrained to award an injunction.

Injunction awarded.

---

The fact that a person has been commissioned by the governor, does not oust the jurisdiction of the court, in a contested election case; *Thompson v. Ewing*, 1 Brewst. 69; inasmuch as a commission issued after a proceeding instituted to contest the election, is regarded only as provisional, or as a commission, *pendente lite*, if the proceeding should be successful; *Ewing v. Filley*, 43 Penn. St. R. 384. A commission is simply evidence of a right to hold an office, gives color to the acts of the incumbent, and constitutes him an officer *de facto*; but it invests him with no right to the office, and is annulled and superseded by the issuing of a new commission to another, who has been legally elected. *State v. Johnson*, 17 Ark. 407. The election having been declared void, the commission issued by the executive, being a mere ministerial act, gives no title to hold the office. *Barry v. Lauck*, 5 Cold. 588. And see *Hunter v. Chandler*, 45 Mo. 453. In issuing a commission, however, to an elective officer, the governor is not precluded from looking beyond the certificate of election, and may determine for himself who was the person duly and legally elected to the office; and the commission, when issued, is presumptive evidence that the person holding it is lawfully entitled to the office. *State v. County Court of Howard Co.*, 41 Mo. 247. The point decided in this Missouri case is at variance with the established principles of our government, and is but another example of the growing tendency in our country, to disregard all law but that of power.

When the seat of a member of a legislative body is contested, the house has no constitutional right to suspend the member from acting as such, until the matter of the petition has been determined. *Mansfield Election*, Cush. Elect. Cas. 17.

## COMMONWEALTH v. COUNTY COMMISSIONERS.

In the Supreme Court of Pennsylvania.

DECEMBER TERM 1834.

(REPORTED 5 RAWLE 75.)

[*Failure to elect.*]

A disorder having arisen at a ward election for assessors, &c., the constable and the persons alleging themselves to have been chosen judges, adjourned the election from the usual place designated in the notice, to a neighboring house, where the relators had the highest number of votes, and were returned by the constable, as duly elected; the electors who remained at the place of election designated in the notice, elected judges and held an election, without calling in the overseers or other persons pointed out by the statute; the persons elected at this poll were returned by the election officers as duly elected: *Held*, that both elections were illegal; and that this being a case of failure to elect, assessors were properly appointed by the county commissioners.

The commissioners have power to inquire into the regularity of a ward election; the constable's return is not conclusive on them.

This was a rule to show cause why a *mandamus* should not issue to the commissioners of Philadelphia county, commanding them to receive the return of the assessment made in Locust ward, by James Leslie, Vollum and Sullivan, to pay them for their services, and to appoint as collector one of the individuals returned by them. The commissioners made return to this rule, that they had duly recognised and appointed Messrs. Rutherford, Benner and Quin, as assessor and assistant assessors of said ward.

It was stated in the return that on the 16th September 1834, Lippard, constable of Locust ward, gave legal notice that an election would be held at the house of James Hutchinson, on Friday the 3d October, for one assessor and two assistant assessors for said ward, for the ensuing year. That two sets of returns were filed in the commissioners' office, one signed by Reese, Gress and Miles, who

(Failure to elect.)

returned that Rutherford was duly elected assessor and Linnard and Benner assistant assessors; the other, signed by Lippard, as constable, and Schofield and Caldwell, as judges, that Leslie had received the highest number of votes for assessor, and Vollum and Sullivan, for assistant assessors.

The return further stated that the electors of Locust ward assembled at the place designated by the constable, and at 2 o'clock P. M. on the 3d October 1834, chose the judges of the election; but who they were, it had been impossible to ascertain with certainty. That on the opening of the polls, or while preparations were making for it, much confusion and disorder arose, and a number of persons forcibly and violently interfered with the due opening of the polls; that these persons, with the constable of the ward, and the two citizens whom they alleged to have been elected judges, opened polls at a neighboring house, and there impartially and tranquilly elected the persons mentioned in their return; that the electors who continued at the place designated in the public notice by the constable, proceeded in the election, impartially and tranquilly, and elected the persons mentioned in the return first above referred to. That the public exigencies requiring them to act without delay, they had chosen the persons mentioned by them in their return.

*Meredith and Scott*, for the relator.

*Dallas*, attorney-general, for the respondents.

ROGERS, J., delivered the opinion of the court. A rule has been obtained on the commissioners of the county of Philadelphia, at the instance of James Leslie, to show cause why a *mandamus* should not issue, directing them to receive the return of the assessment made in Locust ward, by James Leslie, Henry Vollum and Nathan P. Sullivan; to make payment to said persons of the amounts

(Failure to elect.)

prescribed by law for their services as assessor and assistant assessors of said ward; and to appoint as collector of taxes in said ward, one of the individuals returned to them for that purpose, by the said Leslie, Vollum and Sullivan; cause has been shown, the grounds of which are stated at large in the return of the commissioners to the rule.

For the relators to succeed in this application, it must clearly appear, that the assessors *de facto* were not duly elected; for, if it were a doubtful election, a *mandamus* ought not to be granted. I do not take into view, that the assessors *de facto* were not made parties to this rule, as we shall consider the case in the same light as if the rule were amended by the insertion of their names in the record. But still the objection remains, that when there is any doubt of the validity of the election, the court will not interfere by *mandamus*, but will put the party, in the first instance, to an information in the nature of a *quo warranto*; before a *mandamus* would be granted against the commissioners, we should require that there should be a judgment of ouster against those who were actually performing the duties of the office; and this would be a sufficient answer to the rule; for here it is plain, that the election or appointment of the officers *de facto* is not, apparently, such a one as is merely colorable and void. *Rex v. Bankes*, 3 Burr. 1454. But we do not intend to rest the case on this ground, as the effect would merely be, to turn the relators round to a new proceeding; this course would not meet the wishes of either party.

I shall examine the case in two points of view: 1. What is the title of the relators? 2. The title of the respondents? and by respondents, I mean the officers *de facto*, to whom the commissioners directed their precept, and whom we take to be parties to the rule.

1. I must first premise, that as a prerequisite to the issuing of a *mandamus*, it must appear, not only that the respondents have no title, but that the relators have. The writ is grounded on the suggestion of their own right; it

(Failure to elect.)

cannot be claimed as a right, that the court is bound to issue a *mandamus* to compel the commissioners, for instance, to pay money for services rendered as assessors, when they are not legally such, nor even colorably so; and this makes it our duty to inquire, by what title the relators claim to be assessors. The counsel for the relators rest their pretensions on the return of the constable, made in pursuance of the 4th section of the act of 11th April 1799. (3 Sm. Laws 393.) The act directs that the constables holding elections shall make a return thereof, signed by the judges, within ten days, to the commissioners of the proper county, &c., who shall file the same in their office. They contend that the commissioners are compelled to receive and file the return of the constable, and to issue their precept to the persons therein named, to make the assessment; but conceding that the commissioners have no discretion in relation to the return (a point which I shall hereafter notice), yet, it is not perceived, how this helps the relators' case, unless it can also be shown, that the return is conclusive on the supreme court, and that, in fact, there is no tribunal in the commonwealth competent to examine into and correct gross fraud or illegality of procedure on the part of the returning officer. It is in vain to deny, that this court have a superintending power, by information, to examine and correct abuses in such cases; and I cannot conceive how this can be done, in many cases, unless we go behind the return; it is not sufficient that forms have been observed, but it is necessary to its validity that the election shall have been conducted in the manner prescribed by law.

By the return of the commissioners, in which the facts are stated with the requisite clearness and precision, it appears, that the constable, in pursuance of the directions of the act of assembly, gave notice of the time and place of holding the election; that the electors assembled at the time and the place designated, that being the place generally used for the purposes aforesaid; that much con-

(Failure to elect.)

fusion and disorder having arisen, the constable and the two persons who, it was alleged, were elected judges, removed the election from the place designated, and opened the polls at a neighboring house; at which place the relators had the highest number of votes, and were returned by the constable and judges as duly elected assessors of the ward. The change of place was the act of the constable, or of the constable and judges; and if such authority is vested in him or them, it must be by virtue of some act of assembly which has not been produced. The only mode in which the place can be altered, is by force of the act of the 13th April 1807 (4 Sm. Laws 471), which makes it lawful for a majority of the qualified electors present at any meeting held at the usual place for electing assessors or inspectors, or other township officers, to change the place of holding said election, to any suitable or convenient house best adapted for the convenience of the inhabitants of the respective townships. Now, whether the majority present would have had the right to adjourn the election, it is useless to determine, as there is no evidence of an overwhelming necessity; nor is there any allegation that any vote was taken to ascertain the wish of the electors. We are, therefore, of the opinion that the relators were not legally elected, and have no title to the office of assessors; and this is, of itself, a decisive answer to the rule for a *mandamus*.

2. I shall now proceed to examine the respondents' title; and by the respondents, as before intimated, we mean the persons appointed assessors by the commissioners. In discussing the question, it will be necessary to inquire what rights were acquired by the election held at the proper place; for, after the secession of the constable, the electors who remained elected judges, who held an election at the usual place designated by the constable, and returned to the commissioners that John Rutherford, James M. Linnard and John Benner had received a majority of votes, stating the number each had received,



(Failure to elect.)

and that they were duly elected assessors for the ward. This was a proceeding wholly unwarranted; there is no law which authorizes an election under such circumstances, and in the manner above stated; for the 2d section of the act of the 15th February 1799 (3 Sm. Laws 341), prescribes that, if any constable shall neglect or refuse to perform the duties required of him by that act, he shall forfeit the sum of \$50; and in case of neglect, refusal, death or absence from the county of any constable or constables, the overseers of the poor of the township, ward or district, or where there shall be no overseer of the poor, the supervisors of the highways shall perform the duties required to be done by the constable, &c. This act relates to the election of inspectors; but by the 4th section of the act of the 11th April 1799, the constable is directed to hold the elections of assessors; and the elections are ordered to be holden under the same regulations, as inspectors for the general election are directed to be chosen (3 Sm. Laws 393). It is then clear, that on refusal or neglect of the constable, the overseers of the poor, or, in default of an overseer of the poor, the supervisors of the highways, or in the city, the street commissioners who take the place and perform the duty of supervisors, should have been called in by the electors to conduct the election. In default of such an officer, no judges could be properly chosen nor legal election held.

This, then, is the case of a failure on the part of the electors to elect; and the 87th section of the act of 15th April 1834 (Purd. Dig. 963) provides, that if the electors of any township shall fail to choose an assessor or assistant assessor, at the time appointed by law, or if any person elected to such office shall neglect or refuse to serve therein, or if any vacancy shall happen therein, by death or otherwise, the commissioners of the county shall appoint a fit person to fill the office, who shall have the same powers, be subject to the same penalties, and receive the same compensation, as if he had been elected, &c. This act

(Failure to elect.)

should receive a liberal construction; and if there is a failure to elect, for any cause whatever, the power to appoint (for without it the public would be deprived of these important officers) devolves upon the commissioners. On the ground that there had been no election, the commissioners appointed the respondents assessors of the ward, and in this we conceive they exercised a duty imposed upon them by the act.

3. But the counsel for the relators contend, that the commissioners were bound to receive and file the constable's return, and that it was their duty to issue their precept to the persons returned by him as duly elected. Without adverting particularly to the form of the return, it must be observed, that two returns were made, and it was for them to decide which return was correct, or whether either of them should be received; as it is made the duty of the commissioners, in a certain event, to appoint, that seems necessarily to imply the power to inquire whether the event had taken place, on the happening of which, it became their duty to act. It is a startling doctrine that in case of a notorious fraud or a palpable violation of the law, a constable can palm an officer on the public by the force of his return; that by merely omitting to state the place where the election was held, he can control the election, when it is admitted that it was not, in fact, held at the place appointed by the act. If this be the law, it is useless to go through the mockery of an election; the constable may return whom he pleases, always taking care that his return be correct upon its face; it would be better to give the appointment to the constable, at once, without the useless ceremony of an election. The act admits of the construction which we have given to it; nor do we perceive any danger in committing to the commissioners the power to examine into the illegality of elections conducted as this has been. The election is local, but the commissioners represent the whole county; they may be fairly supposed as, in some measure, exempt

(Failure to elect.)

from the feelings which act on the electors of the ward or township, and therefore, a reasonable hope may be entertained of something like impartiality. If, however, this hope should fail, the aggrieved party may resort to an information, when the whole case will be examined, and right and justice done.

In the course of the argument, reference was made to the act of the 19th March 1824 (P. L. 53), but that act only gives jurisdiction to the quarter sessions, in the case of a contest with respect to the election of county commissioners, auditors and other county officers. An assessor is not a county, but a township officer, a distinction plainly marked in the various acts of assembly, and particularly in the act of the 15th April 1834, entitled "an act relating to counties and townships, and county and township officers."

Rule discharged.

---

In Alabama, it was decided in the case of *State v. Adams*, that a failure to elect by the people, by reason of the opposing candidates having an equal number of votes, created a vacancy in the office, which it was competent for the executive to fill by appointment. 2 Stew. 231 (ante 286).

## SALTER v. COUNTY OF PHILADELPHIA.

In the Court of Common Pleas of Philadelphia.

SEPTEMBER TERM 1851.

(REPORTED 1 PHILADELPHIA 255.)

[*Compensation of election officers.*]

The courts have no power to allow compensation to election officers, for extra services, beyond the amount prescribed by statute.

Case Stated. The plaintiff was a clerk of the election held in the second precinct of the 5th ward, Kensington, on the second Tuesday of October 1851, and as such attended the polls and discharged the duties of his office, on the day of election, and in preparing the necessary papers and returns; he was afterwards employed for two days in perfecting such papers. The defendants paid the plaintiff the sum of \$2, for his services as clerk, for the day on which the election was held, and contended that he was not entitled to any other or greater sum for his services under the act of 28th April 1851. The plaintiff, however, contended that he was entitled to extra pay, for services rendered after the closing of the polls; and that the county-board having made an appropriation for the payment of such services, the county commissioners were bound to disburse the money. It was agreed that, if the court should be of opinion that the plaintiff was entitled to recover for such extra services, judgment should be entered in his favor for \$4; otherwise, judgment to be entered for the defendant.

KING, P. J., delivered the opinion of the court. That the compensation allowed to the officers of the general election, under the act of the 28th of April 1851, is inadequate to the labors required to be performed by them, I am prepared to admit; but that, certainly, affords no suf-

(Compensation of election officers.)

ficient reason for allowing them a greater compensation for their services than is expressly ascertained by law.

When the city and county of Philadelphia was divided into small election precincts, for the purpose of facilitating the reception of votes, it was seen, that the expenses of such multiplied polls would heavily increase the public expenditures, if that contingency was not carefully guarded against. It was to meet this manifest result, that a precise sum was designated by law as a full compensation for the services of the officers, in *conducting such elections*. To conduct an election, means to execute all the duties connected with it, required by law; these duties form a whole; and when a precise sum is allowed for an entire public service, such public service cannot be subdivided into parts, and separate compensations allowed for each. It is for the service that the compensation is allowed, not for the quantity of time employed in its execution. The law is express, its intention is clear, and this intention is best consummated by permitting it to speak for itself; if there were room for allowing a construction sufficiently liberal to embrace the plaintiff's claim, I should feel disposed to adopt it; but this I cannot find either in the terms, the spirit or the policy of the act.

The appropriation made by the county-board cannot change the question, which is one of the legality of the plaintiff's demand, not of its abstract merits. The appropriation I consider as the expression of the favorable opinion of that respectable body in reference to the claim, and as such, it is entitled to, and must be received with, every consideration; but before this court, the claim of the plaintiff must be regarded and determined as a question of positive law. Although I agree with the county-board, that the plaintiff's claim is a reasonable one, yet, finding no warrant for its allowance, in the law, but the contrary, I cannot pronounce a judgment directing its payment out of the public treasury. The result is, that there must be judgment for the county on the case stated.

Judgment for defendant.

UNITED STATES *v.* QUINN.

In the Circuit Court of the United States for the Southern  
District of New York.

NOVEMBER 1870.

(REPORTED 3 AMERICAN LAW TIMES REPORTS 180.)

[*Congressional legislation.*]

The 20th section of the act of congress of the 31st May 1870 (16 Stat. 140), punishing a fraudulent registration, for the purpose of voting for a member of congress, is a constitutional enactment.

WOODRUFF, J. (BLATCHFORD, J., concurring), delivered the opinion of the court. The demurrer to the indictment now before the court, which was the subject of discussion at our yesterday's session, presents two questions. The first is, whether the law of the United States under which the indictment is found, is constitutional, or, in a more general form, whether it is a valid enactment; it is assailed, however, only upon the ground that it is an infraction of the constitution of the United States: secondly, whether the indictment sufficiently charges an offence under the law. The court will not endeavor to discuss, with great minuteness or particularity, these two questions; the shortness of the interval which has elapsed since the argument closed, has precluded the elaboration of an opinion upon the points which are raised. Had the court entertained serious doubt of the correctness of the conclusions which they have reached, they would have taken time for greater deliberation, and if it seemed to them fit, have endeavored to throw light upon the subject by an extended discussion. But entertaining no doubt, and deeming it unnecessary and unprofitable that the progress of the public business should be delayed for the purpose of indulging in an elaborate exposition of constitutional

(Congressional legislation.)

or other law, we feel, not only at liberty, but constrained to confine ourselves to a very brief statement of the leading grounds upon which the conclusion we have reached must rest.

First, then, as to the constitutionality of the act in question. It is important, perhaps, certainly we deem it wise, in approaching that subject, to state just what the question is, which we are called on to consider, and to what a narrow point of inquiry the questions involved in the present demurrer, bring us. The section of the act of congress upon which this indictment is found, is single; it is a single section of a single statute. Its validity involves the consideration of no other sections of the same or other statutes; its discussion does not bring into view numerous questions which were alluded to in the progress of the argument, which might or might not be fit subjects for discussion, if other statutes, or other sections of the same statute, were before us for review.

Without reading the section, under which the indictment is found, at length, or attempting to speak of it in technical terms, it must suffice to say, that it is an act which makes a fraudulent registration, or fraudulent attempt to register, by a person not having a legal right to do so, for the purpose of an election of a member of congress, a crime against the United States of America; and the validity and constitutionality which we are to consider, rest alone upon the single question, has congress the power, under the constitution, to declare a fraudulent registration, or fraudulent attempt to register, for the purpose of voting for a representative or delegate in congress, a crime against the United States? We, therefore, enter into no consideration of various topics which were alluded to, referring to other details of other laws or of the act of which this section is a part.

There are four provisions of the constitution of the United States, reference to which is pertinent to the inquiry before us, namely: Art. I., sect. 2. The house of

(Congressional legislation.)

representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature: Sect. 4, § 1. The times, places and manner of holding elections for senators and representatives, shall be prescribed, in each state, by the legislature thereof; but congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators: Sect. 5, § 1. Each house shall be the judge of the elections, returns and qualifications of its own members: Sect. 8, § 17. Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

I. Does the act in question infringe the provision of the constitution that I have read, which provides that electors in each state shall have the qualifications requisite for the electors of the most numerous branch of the state legislature? It is argued, with great ingenuity and ability, that the act in question infringes that clause of the constitution, because it seeks to establish the test of qualification; it seeks to affirm the evidence of qualification, and by so doing, it, *ex vi termini*, imposes qualifications itself. We apprehend that this argument rests upon no solid basis; the act in question neither professes, nor, by any implication, can it, we think, be construed, to affect the qualification of any elector anywhere. It imposes no duty to register; it prohibits no registration that is required in the state in which the elector seeks to exercise his franchise; it touches no qualification of the elector in any other respect; it leaves the state to prescribe the qualifications of electors for the most numerous branch of the state legislature, in the largest and fullest extent, untouched and unaffected; it says and only says, that when the qualification of regis-



(Congressional legislation.)

tration is imposed by the state law (leaving the expediency and wisdom of such a law entirely to the judgment of the state), it shall be an offence against the laws of the United States, to contribute, by fraud or violation of the state registry laws, to the sending of a representative to the congress of the United States, who is not clothed with the authority which a true expression of the popular will would give; and that is all.

But it is said that congress, having nothing to do with the question of qualification, cannot treat of the subject of qualification at all; because, to require that the elector shall have the qualification which the state law imposes, and make his voting or registration an offence, if he has not that qualification, is, on the part of congress, to impose a condition itself on the right to vote. The court do not feel called upon to say, however little doubt they may feel upon the subject, whether or not the congress of the United States might, if they saw fit, make it a condition, throughout these United States, that all who come to elect members of the house of representatives shall first register their names. We do not conceive that that question is involved; but that the prescription of such a condition is no infringement of the elector's right to vote, we have no doubt, and we refer with confidence and with satisfaction to the constitution of the state of New York as the exposition of the views of her people and her legislature, at least, upon that precise question. It is provided in her constitution of 1846, that any male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of the state for one year next preceding the election, and for the last four months a resident of the county where he may offer to vote, shall be entitled to vote in the election district of which he shall be, at the time, a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people; a declaration of qualifications, and the sole qualifications which, under the consti-

(Congressional legislation.)

tution of the state of New York, it is competent to prescribe. And this same constitution, not deeming this unqualified declaration of the qualification of voters infringed, in any degree, has in section four of the same article, provided that laws shall be made for the ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established. Our reflections lead us, therefore, to the conclusion, and without hesitation, that the prescription of a mode of ascertaining and certifying the qualification of him who shall present himself to exercise the elector's privilege, is no infringement of the clause that declares what shall constitute the requisite qualification, and is no attempt to prescribe to the states (to this or any other state) any condition for the exercise of the right of suffrage, and no attempt to prescribe the qualifications of an elector. If we are right in this, then the second section of the first article of the constitution is no impediment to the legislation of congress upon this subject.

II. The next clause of the constitution to which we refer (sect. 4, § 1), declares that the times, places and manner of holding elections for senators and representatives shall be prescribed, in each state, by the legislature thereof; but the congress may, at any time, by law, make or alter such regulations, except as to the place of choosing senators. Upon this affirmative provision of the constitution, and in support of the legislation which is now assailed, it is insisted, that this clause of the constitution warrants the passage of the act in question, on the one hand, while, on the other, it is denied, first, that this section includes the authority claimed; and secondly, that the authority attempted to be exercised is within it.

The framers of the constitution of the United States placed its government, all its strength and vigor, and all its permanent capacity for usefulness to the people, for whom it was made, in the votes of the people themselves. The debates in the convention in which the constitution

(Congressional legislation.)

was framed, the discussions which were had, by way of exposition, when the constitution was presented to the states for their acceptance (both of which were cited to us in the argument), show, in the fullest manner, that those framers of the constitution did not, for one moment, lose sight of the indispensable condition, on which alone a government of the people could be safe to the people themselves, or could secure the beneficent ends for which it was instituted, that the popular vote should be the true expression of the opinions and choice of the electors. Hence, we say, this section four of the first article of the constitution; and hence (as was ably and clearly exhibited in the argument of the learned counsel for this defendant), the framers of the constitution, either through an apprehension that in some possible change of events, the states might become indifferent to the general good, and so neglect their duty, or warned, perhaps, by experience had under the previous articles of confederation on that subject, or, with wisdom forecasting the possibility that, at some distant period, circumstances might arise in some state, in which obstacles would be interposed to the full and fair expression of the popular voice, and so, conscious that the very preservation of the government itself, for all its useful ends, demanded that its perpetuation through a popular vote should be secured, by this fourth section, conferred power upon congress for that self-preservation. Time might be somewhere so arranged, and for some end other than the well-being of the whole nation, that the popular voice might be denied a full expression; place might be so fixed, as in that mode to defeat the general and the indispensable purpose; the manner of holding an election might be such, as to operate to prevent an open, fair expression of the popular voice; or, to use an illustration freely used in the discussions had, when those men who went into the various states and elsewhere, wrote in explanation of the provisions of the constitution, that the people might understand it, elections might be so con-

(Congressional legislation.)

ducted, either through an indifference of the states, or otherwise, that the general government might find itself unsupported by the very people on whose will the foundations of the government rested. Hence, we say, the scheme pointed out by this section four; and hence, we say, the explanations which were given by the great and good men who expounded it.

It seems to me, that we ought to pause but a moment upon the suggestion, that in the enforcement of a law such as we have now before us for consideration, intended to secure an election of members of the house of representatives, by the giving of all legal votes, and by the giving of none that are fraudulent; the government of the United States has no interest. "The government of the United States"—what is that? It may be conceded to be an artificial thing which men call "government," and which is sometimes looked upon as the source as well as the exhibition of power, and not capable of interest more than it is of thought or feeling. But the government of the United States, in the true sense, is the people of the United States, one and all, throughout the length and breadth of the land. And the people of the United States, here and elsewhere, have not only an interest, but an interest that is vital, in the preservation of their institutions, and in the preservation of all that is pure, just and honest in the popular vote, on which, for their safety and security, their institutions and their government rest.

Now it is conceded, if I have rightly apprehended the arguments which have been addressed to us, to be within the constitutional grant of power to congress, to proceed, under this power, to regulate the time, place and manner of holding elections, and to make such regulations as to each, that all the electors, in every state, shall have full and fair opportunity to declare their will. And the illustration chiefly used in the discussion to which I have referred, was one drawn from the supposition that, possibly, the intervention of congress to secure that

(Congressional legislation.)

end might become necessary. It is equally important, that no one who is not an elector shall be permitted to defeat the will of those who are, by interposing his vote. It is also equally important, that no one shall be permitted to deposit more votes than he is entitled to; and both these possible evils rest precisely on the principle on which it was declared that this clause might be useful, and the exercise of the power might become necessary, in order that all legal voters should have full and fair opportunity to deposit their votes. The court are not able to see the difference in principle between a regulation to enable all to vote who are entitled to vote, and a regulation to prevent men from voting who are not entitled, or to prevent men from voting more times, or in more places than one. If not, then the power to do the one, and the power to prohibit the one, involves the power to prohibit the other; the power to make a regulation that shall secure to every man entitled to a vote, a safe and convenient exercise of his privilege, involves the power to see to it that no one who is not entitled to vote shall be permitted to exercise that right.

All this leaves, as I have already stated, the subject of the qualification of electors, untouched; leaves the laws of the states, the laws of the state of New York, to operate in their full force. And although it be true, that the laws of the state of New York cannot be relied on as the source of authority, or as giving any vigor to the enactment, yet, if it be necessary to refer the power of congress to pass this enactment, to a grant to be found in the constitution, wholly independent of state authority, then, the court must say, it has it in the section before us. And if it be true, that the existence of that power in congress is exclusive, so that, when exercised, it takes the place of existing state laws, and the imposition of state penalties, be it so; this involves no new principle. The court and the people of the country have long been familiar with the doctrine which is now conceded, and indeed insisted on here, that the legislation

(Congressional legislation.)

of congress on the subjects entrusted to it by the constitution, is exclusive.

On that subject, two observations are pertinent; the first is, that failure to exercise the power hitherto, is shown by the history of this government, to furnish no argument against its existence. The debates to which I have referred, the discussions to which I have alluded, breathe of the confidence the framers of the constitution had, not only in the patriotism, but in the intelligence and wisdom and fidelity of the people; in the congress of the United States which was convened, and has continued to be convened from that time onward, the same confidence that the people of the United States would, on this subject, make all due and needful regulations, has been exhibited. If it be true that the time has come, which the contemporaneous exposition of the constitution contemplated as possible, and designed to anticipate and guard against, in which it was expedient for congress to intervene and exercise the power, then that time has come, the anticipation of which furnished the occasion and the ground for introducing this clause into the constitution. Whether that time has come in which just apprehension warranted legislation; whether occasion, therefore, exists which made it best and wisest that congress should exercise the power, is a question with which a judicial tribunal has nothing to do; of that, congress is the sole and proper judge.

The other observation, having reference to this lapse of time, which I propose to make, is this, that there are numerous powers conferred by the constitution upon congress, which, for a time, remained dormant in their hands; there are powers which even now remain dormant; and the history of adjudication on this subject, shows it to have been well established by decisions of the supreme court of the United States, that the circumstance that states have legislated, and legislated through periods of years, upon a subject, without question and interference

(Congressional legislation.)

by congress, in no degree impairs the force of the constitutional grant to the congress of the United States, and their neglect to exercise the power in no sort defeats the power itself. On the contrary, until the congress of the United States acts in the exercise of the power, the states, in matters not directly inhibited, legislate and their legislation has full force and validity; when the act of congress comes, then that act is exclusive. And again, therefore, I say, if it be true, if the argument be sound, that the power of the state of New York to punish, cannot coexist with the power of congress to impose punishment, under the law which we have before us, then, the exclusive legislation of congress must prevail; and it is reasoning reversely, to argue that "the two cannot coexist—the legislation of the state does exist, and therefore, the act of congress cannot stand;" it is reversing the order of argument; the true statement is this—if the two cannot coexist, the act of congress is controlling, and the state law gives way. Perhaps, I have not done justice to the argument, as it was presented; but these observations seem to me pertinent to one of the views which were presented to us in the discussion.

III. I have anticipated in what I have said, the force and effect of the 17th subdivision of the 8th section of the same article, the power to make all laws which shall be necessary or proper for carrying into execution the foregoing power. If, according to the view which we take of the section already considered, congress has power to regulate the time and manner of holding elections, so as to secure as well a full and fair opportunity to vote, at all elections for members of congress, as also to see to it that no one fraudulently exercises the privilege of voting, then it follows, under the 17th subdivision, that congress has the power to pass all laws which shall be necessary to give effect to those regulations; and we know of none so efficient, as to add the sanction of a penalty.

IV. There is another section upon which I desire to make

(Congressional legislation.)

a single observation: sect. 5. "Each house shall be a judge of the elections, returns and qualifications of its own members." We do not think it necessary to rest our views of the constitutionality of the law upon that section, and yet, the argument, to our minds, is plausible to a high degree, if, indeed, we ought not to regard it as satisfactory, alone considered, viz: that when the constitution confers upon each house the power to judge of the elections, returns and qualifications of its own members, and then authorizes them to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested in any department of the government, it authorizes congress to make such laws touching the conduct of elections and returns, as will operate, first, to furnish each house of congress appropriate evidence of the validity of the commission or appointment of any man who comes there claiming the right to a seat, and alike to prohibit the intervention of any obstacle which might embarrass or prevent the exercise of the right of each house to judge of the election of any man who claims a right to a seat.

It is familiar to us all, that when a contest arises (I refer to this as the practical exposition of the subject), congress feels itself at liberty to probe the matter of the election of a representative to its very foundation; to look through and beyond all forms of authentication and certificate, and inquire and determine the actual fact, whether or not, he who claims a seat is entitled thereto; and our statute book contains numerous provisions having for their object the facilitating of the inquiry. And can it be, that when congress is clothed with full powers to pass all laws to carry into effect this power conferred upon a department of the government, they may not make it an offence against the laws of the United States, to effect a fraudulent registration, which is to stand as *prima facie* evidence that the vote which is cast is a legal and proper one? I will not enlarge upon this branch of the subject; but there are



(Congressional legislation.)

considerations tending strongly to the inference that the power contained in the last two clauses which I have named, is full and ample to sustain the constitutionality of the section on which this indictment is founded.

The learned judge then proceeded to show that the indictment, being for a statutory misdemeanor, and the offence being charged in the words of the statute, was sufficient. (See 12 Int. R. Rec. 153.)

Demurrer overruled and judgment  
for the United States.

---

The constitutionality of the 20th section of the act of 31st May 1870, may, perhaps, be conceded, without endorsing the whole of a law, which is apparently designed to give to the federal executive a controlling influence in the state elections. Probably, the worst feature of this act is the 13th section, which declares it lawful for the president to employ such part of the land and naval forces of the United States or of the militia, as shall be necessary to aid in the execution of judicial process under the act. The use that may be made of this power was shown in two or three recent instances, in which, although no judicial process had been issued, and no infraction of the law had occurred, portions of the military forces of the United States were stationed in the immediate vicinity of the polls, on election day, for the undisguised purpose of overawing the electors in the exercise of the right of suffrage. And this, not with a view of securing to the friends of the federal administration a fair election for members of congress (for in each of these cases the return of a friend of the administration was acknowledged to be hopeless), but for the ulterior purpose of influencing the election for state officers. If the American people are content to endorse this action, as a constitutional exercise of federal power, they have strangely degenerated from their British ancestors.

In 1741, during the corrupt administration of Sir Robert Walpole, at an election held for the city of Westminster, under an order signed by three magistrates of the county, a body of armed soldiers was marched up and stationed in the churchyard of St. Paul, Covent Garden, in the vicinity of the poll; and on this being shown to the house of commons,

(Congressional legislation.)

they passed a resolution affirming "that the presence of a regular body of armed soldiers, at an election of members to serve in parliament, is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." The high bailiff was taken into custody by order of the house, and the three magistrates who signed the order were brought to the bar and reprimanded by the speaker, upon their knees, as the house had directed; and after this, the house passed a vote of thanks to the speaker, for his reprimand of the delinquents, and directed the same to be printed. This is the mode in which our ancestors resented such infractions of their political liberties; it is to be hoped, there is still virtue enough in their descendants to follow their example.

As early as the 4th April 1803, the state of Pennsylvania provided by statute that "no body of troops, being regularly employed in the army of the United States or of this state, shall appear and be present, either armed or unarmed, at any place of election within this state, during the time of said election." 4 Smith's Laws 101. And this wholesome provision to secure the political liberties of the people was re-enacted by the act of 2d July 1839, § 95. *Purd. Dig.* 383. It may well be doubted, whether a violation of this statutory regulation would not vitiate the poll.

In 1793, a committee of the House of Representatives reported against the right of a member to his seat, on the ground of the presence of federal troops in the immediate vicinity of the polls, and the interference of some of the soldiers with the freedom of the election. And in consequence of this occurrence, a bill was passed by the house "for removing any military force of the United States from the places of holding elections;" this, however, failed to become a law in consequence of the non-concurrence of the senate. *Trigg v. Preston*, 1 Cong. Elect. Cas. 78. Blackstone says, "it is essential to the very being of parliament, that elections should be absolutely free; therefore, all undue influences upon the electors are illegal and strongly prohibited." 1 Bl. Com. 178. For, Mr. Locke ranks it among those breaches of trust in the executive magistrate, which, according to his notions, amount to a dissolution of the government, "if he employs the force, treasure and offices of the society to corrupt the representatives, or openly to pre-engage the electors and prescribe what manner of persons shall be chosen; for, thus to regulate candidates and electors, and new-model the ways of election,

(Fees of office pending a contest.)

what is it," says he, "but to cut up the government by the roots and poison the very fountain of public security?" Locke on Government, p. 2, § 222.

Perhaps, there is no better proof of the extent to which the principles of civil and political liberty have passed from the remembrance of the American people, than the fact recorded in the daily newspapers, *without comment*, that at the municipal election of the city of Charleston, held on the 2d August 1871, six years after the close of the civil war, a body of federal troops was stationed at each precinct, to prevent violence. And this, without shadow of authority, and without its exciting the slightest emotion in the citizens of what is claimed to be a free country.

---

## MAYFIELD v. MOORE.

In the Supreme Court of Illinois.

SEPTEMBER TERM 1870.

(REPORTED 3 CHICAGO LEGAL NEWS 114.)

[*Fees of office pending a contest.*]

The title to an office confers upon the person elected a right to the fees and emoluments thereof, from the commencement of his legal term.

An action for money had and received will lie by the officer *de jure* against one who has intruded into the office, by color of a certificate of election, to recover the fees received during the time of such intrusion.

If the incumbent received his commission, *bonâ fide*, he will be allowed, in such action, his reasonable expenses in executing the duties of the office; otherwise, if his intrusion were without pretence of legal right.

Appeal from Morgan county. This was an action of assumpsit brought by Milton Mayfield, in the Morgan circuit court, against Sylvester L. Moore, to recover the fees received by the defendant, as sheriff and collector of the state, county and other revenue. On the 6th November 1866, the plaintiff and defendant were opposing candidates for the office of sheriff of Morgan county; on a canvass of the vote, a certificate of election was given to the defendant, who received a commission and entered

(Fees of office pending a contest.)

upon and discharged the duties of the office, from the 17th November 1866 until the 13th January 1868. Soon after the canvass of the vote, the plaintiff gave notice to the defendant that he should contest the election, on the ground that illegal votes had been cast for the defendant, more in number than sufficient to change the result. Justices of the peace were selected in the mode pointed out by law, and a trial was had, which resulted in favor of the plaintiff, finding him, on the evidence, to be entitled to the office. From this decision, the defendant appealed to the circuit court of Morgan county, where a trial was had, with a like result. To reverse the judgment of the circuit court, the defendant sued out a writ of error to the supreme court, which was subsequently dismissed, and the plaintiff was duly commissioned and entered upon the duties of the office.

The plaintiff then brought this suit, to recover the fees and emoluments of the office received by the defendant whilst acting as sheriff. A trial was had in the court below, where the plaintiff recovered a judgment for \$34.55, the amount of fees received after the rendition of the judgment by the circuit court, and before the office was surrendered to the plaintiff. On the trial, the plaintiff offered to show the amount received by the defendant, whilst he exercised the office, as fees, allowances and emoluments, but the court overruled the offer, and confined him to the fees, commissions and profits received by the defendant, after the decision of the case by the circuit court. The plaintiff, thereupon, took his appeal to the supreme court, and assigned such ruling of the circuit court for error.

*Ketchum and De Leww*, for the appellant.

*Case and McClure & Stryker*, for the appellee.

WALKER, J., delivered the opinion of the court. It is urged by the appellant, that he, being entitled in law to

(Fees of office pending a contest.)

the office, the fees and emoluments incident to it followed the title and vested in him; and that, on the familiar rule, that where one person has received money which, in equity and good conscience, belongs to another, he may sue for and recover the same, in an action for money had and received.

We presume it will not be questioned, that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place; that where such an officer performs the duties of the office, he may demand and receive the compensation allowed by law. It cannot be, that in such a case, another person can legally claim such compensation; an officer, having rendered services, is as fully entitled to the compensation fixed by law, as is any one individual entitled to a reasonable compensation for labor and skill rendered for another; the fees and emoluments are legally his. We also find that the authorities have gone still further and held, that where a person has usurped an office belonging to another, and received the accustomed fees of the office, money had and received will lie, at the suit of the person entitled to the office, against the intruder. *Arris v. Stukely*, 2 Mod. 260; 1 Selw. N. P. 68. And the same rule was announced and enforced in the case of *Crosbie v. Hurley*, 1 Alc. & Nap. 431; in this last case, there was a contest as to the title to the office, and the person recovering the title to it, sued the other who had acted, and recovered the fees and emoluments received whilst in possession and exercising the duties of the place. The same rule has been adopted in this country, and seems to be based on common law rules.

It is said by Blackstone, that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, and are also incorporeal hereditaments, whether public, as those of magistrates, or private, as bailiffs, receivers or the like; for a man may have an estate in them, either to him and

(Fees of office pending a contest.)

his heirs, or for a term of years, or during pleasure only, save only, that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice; for then they perhaps might vest in executors or administrators." 2 Bl. Com. 36. Thus, it is seen, that the right to the fees and emoluments is stated to be coextensive with the office; and this is undoubtedly correct, as it is analogous to every other thing capable of ownership. No principle of law can be clearer, than that the owner of lands and chattels is entitled to the products, increase or fruits flowing from them; and the fees of an office are incident to it, as fully as are the rents and profits of lands, the increase of cattle, or the interest on bonds or other securities. A person owning any of these things, is, by virtue of such ownership, equally entitled to the issues and profits thereof, as to the thing itself. If, then, the appellant was the owner of, and held the title to the office of sheriff, he was as clearly invested with the right to receive the fees and emoluments; they were incident to, and as clearly connected with the office, as are rents and profits to real estate, or interest to bonds or such like securities. *Glascock v. Lyons*, 20 Ind. 1; *Petit v. Rousseau*, 15 La. 239; *People v. Smyth*, 28 Cal. 21; *People v. Tieman*, 30 Barb. 193. We think that, on both reason and authority, the appellant is entitled to recover the fees and emoluments arising from the office whilst it was held by the appellee.

It is, however, urged, that the appellee surrendered the office as soon as it was finally judicially determined that the appellant was entitled to it, and is, therefore, not liable to account for any fees but those received after the circuit court decided the case on appeal from the three justices of the peace. This is not a question of intention, but a question of legal title to the sum in dispute. Under the law, so soon as a majority of the votes were cast for the appellant, at the election held in pursuance of law, he became legally and fully entitled to the office; the title was as

(Fees of office pending a contest.)

complete then, as it ever was, and no subsequent act lent the least force to the right to the place. The commission was evidence of the title, but not the title; the title was conferred by the people, and the evidence of the right by the law. Nor can it be successfully claimed, that the appellee was not in the wrong; he was bound, before entering upon the discharge of the duties of the office and the receipt of the emoluments, to know whether he had title; his position was the same as that of a person who, having a defective title to a tract of land, enters into possession and the receipt of the rents and profits; he entered at his peril. Nor do we perceive any hardship; after the vote was canvassed by the clerk and a justice of the peace, the appellant promptly gave the appellee notice that he would contest the election, and specifically pointed out the grounds; being thus apprised of the grounds upon which the appellant based his claim, the sources of information were open to him to have learned the facts, and to have acted upon them; failing to learn them, or, having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated upon another. He has entered into the appellant's office, without right, and has received the profits of it, and like the person entering into the land of another, with a defective title, he must answer for the profits.

Inasmuch, however, as the appellee obtained the certificate of election and a commission was issued to him, he was acting in apparent right, and in so far as this record discloses, he resorted to no fraudulent or improper means to produce that result, he does not occupy the position he would, had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses incurred therein. This being an equitable action, it should be governed in this respect by the same rules that would have obtained, had this been a bill for an account, instead of an action for money had and received. He should have

(Fees of office pending a contest.)

only a reasonable allowance for the necessary expenses in earning the fees and emoluments; had he intruded without pretence of legal right, then a different rule would, no doubt, have been applied.

In adopting the time when the circuit court decided that the appellant was entitled to the office, as the period from which he was entitled to have the fees and emoluments of it, the circuit court erred. That decision was no more potent to confer the right to the office, than was the decision of the three justices of the peace; it, as we have seen, was not the decision, but the vote of a majority of the electors of the county, that conferred the right; the court, on the evidence, found and declared the title, but did not confer it. We have seen, that the appellant was entitled to the office and its emoluments from the time the appellee entered into it, and he became liable to account for them from that date, until he ceased to act and receive the fees and perquisites of the office. The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

---

As early as 30 & 31 Car. II., it was ruled by the court of king's bench, that *assumpsit* for money had and received would lie against a usurper, for the fees received by him, during his occupancy of the office. Howard v. Wood, 2 Lev. 245; s. c. 2 Jones 126. And this was followed in Arris v. Stukely, 2 Méd. 260; Powell v. Milbank, 1 T. R. 399 n.; Boyter v. Dodsworth, 6 T. R. 681; Lightly v. Clouston, 1 Taunt. 114; Crosbie v. Hurley, 1 Alc. & Nap. 431. And the same doctrine is fully sustained by the American cases. Thus, in People v. Pease, 27 N. Y. 56, it was said by Davies, J., that on a recovery in *quo warranto*, "the legal consequences follow, that the person usurping the office is ousted, the person legally entitled takes the office and its fees, and recovers from the usurper the fees or emoluments belonging to the office, received by him by means of his usurpation; if the term of the office should have



(Fees of office pending a contest.)

expired before the final determination of the question, it follows, that the successful party cannot take the office, but he will be none the less entitled to recover the fees and emoluments to which he was legally entitled, which may have been received by the usurping claimant. So, in *People v. Tieman*, 30 Barb. 195, it is said, that "the salary and fees are incident to the title, and not to the usurpation and colorable possession of an office.—Possession under color of right may well serve as a shield for defence, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office."

In Indiana, it has been decided, that if a person rightfully in the possession of an office to which he is entitled, be ousted therefrom by an intruder, an action for money had and received will lie in his favor, against the usurper, to recover the fees, when fixed or customary fees are incident to the office; and that in such action, the title to the office may be determined. *Glascok v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 Ind. 479. In California, it was held, that one having the legal right to an office, but not in possession of the same, is entitled to the salary for the term for which he was elected; and that the payment of the salary to one in possession, without title, would not prevent the party having title from recovering the salary. *People v. Smyth*, 38 Cal. 21; *People v. Oulton*, *Ibid.* 44; *Carroll v. Liebenthaler*, 19 Am. L. Reg. 448; and see *Petit v. Rousseau*, 15 La. 239. In Pennsylvania, the only case, in which this question has been referred to, is that of *Ewing v. Thompson*, 43 Penn. St. R. 378 (ante 580), where it was said by Mr. Justice Strong, that in the case of a contested election for sheriff, the party found to be legally entitled to the office would be entitled to recover from the usurper the fees and emoluments of the office from the date of his commission; but this was not the point in the case, and appears to have been a *dictum* given without argument upon the question. The right to recover, however, in such cases, appears to rest both on principle and authority. See *Hunter v. Chandler*, 45 Mo. 453; *Philadelphia v. Given*, 60 Penn. St. R. 136; *United States v. Addison*, 6 Wall. 291; *Mott v. Connelly*, 50 Barb. 516.

## JACKSON v. WALKER.

In the Supreme Court of New York.

MAY TERM 1843.

(REPORTED 5 HILL 27.)

*[Influencing elections.]*

An agreement by the defendant to pay the plaintiff \$1000, in consideration that the latter, who had built a log-cabin, would keep it open for the accommodation of political meetings, to further the success of certain persons who had been nominated for members of congress, &c., is illegal, and cannot be enforced.

Error to the Superior Court of the city of New York. In the court below, the plaintiff, in his declaration set forth that, in 1840, he erected a building in Broadway, in the city of New York, commonly called a log-cabin, intended for public and other meetings of the whig party, and for the sale of refreshments; that he suffered a loss therein and was about to tear it down; and that in consideration that he would suffer it to remain and be kept open for the benefit of the whig party, until after the election of members of congress and presidential electors, &c., to be elected in November of that year, the defendant promised to pay him \$1000 on the 20th of November.

On the trial it was proved, that the plaintiff built the log-cabin, in 1840, at an expense of \$1600 to \$1800; in August of that year, he said he would take it down, unless a certain sum were raised; a subscription was opened, and nearly \$200 were subscribed; the plaintiff and defendant then met, and the defendant told the plaintiff that "the log-cabin must not be taken down until after the election, that he," the defendant, "would not permit the whig flag across Broadway to be struck," and that he would raise the balance of \$1000, or pay it out of his own pocket, by

(Influencing elections.)

the 20th of November; the plaintiff said, "he wished no ifs and ands about it, but wanted the money to be forthcoming for certain," and requested the defendant to give him his note; the defendant replied, that his "word was his bond," and said to the plaintiff, "I will pay you the \$1000, out of my own pocket, on the 20th of November next;" the plaintiff then agreed to it, and "the log-cabin was kept open until after the election, and was used by the whig party, for political meetings, and was the whig headquarters, in a measure." It was kept open to promote the election of the electoral ticket in favor of Gen. Harrison, for president; and after the election it was removed.

On this evidence, the plaintiff claimed to recover the \$1000; the defendant moved for a nonsuit, on the ground that the contract was illegal, being a violation of the election law; the motion was denied, and an exception taken. The defendant then insisted, that the jury had a right to determine, from the whole evidence, whether the contract was or was not within the meaning of the statute; the court charged the jury that the contract was not within the statute, to which an exception was taken; and there was a verdict and judgment for \$1000; whereupon the defendant sued out his writ of error.

*Stevens*, for plaintiff in error.

*Sherwood*, for defendant in error.

BRONSON, J., delivered the opinion of the court. The first section of the act of 1829, "to preserve the purity of elections," is in these words: "It shall not be lawful for any *candidate* for an elective office, with intent to promote his election, or for any *other person*, with intent to promote the election of such candidate, either, 1st. To provide or furnish entertainment, at his expense, to any meeting of electors, previous to or during the election at which he shall be a candidate: or, 2d. To pay for, procure or

(Influencing elections.)

engage to pay for any such entertainment: or, 3d. To furnish any money, or other property, to any person, for the purpose of being expended in procuring the attendance of voters at the polls: or, 4th. To engage to pay any money, or deliver any property, or otherwise compensate any person for procuring the attendance of voters at the polls: or, 5th. *To contribute money for any other purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing, and the circulation of votes, handbills and other papers, previous to any such election.*" The third section declares, that "every person offending against the provisions of this act shall be deemed guilty of a misdemeanor." Stat. 1829, 565, ch. 373.

If, at the time the promise was made, it would have been unlawful for the defendant "to contribute money," for the purpose of preserving and keeping open the log-cabin, it is quite clear, that his promise to pay money for that purpose at a future day cannot be enforced. Now, to what end was the log-cabin to remain? The plaintiff tells us in the declaration, that the building, besides the sale of refreshments, was "*intended and calculated for public and other meetings of a certain political party, known and designated by the name of the whig party;*" and the consideration of the promise was, that the plaintiff would not tear down or remove the log-cabin, but would suffer the same to remain, and would keep or cause the same to be kept open, "*for the benefit of the said whig party, until after the election*" of *members of congress, presidential electors, &c.* The plaintiff then avers that he performed the agreement on his part; and so is the proof; the witness says, "the log-cabin was kept open until after the election, and *was used by the whig party for political meetings, and it was whig headquarters, in a measure; it was kept open to promote the election of the electoral ticket in favor of Gen. Harrison for president.*"

The statute, after forbidding several things, declares

(Influencing elections.)

that money shall not be contributed "for any *other* purpose, *intended to promote an election of any particular person or ticket.*" It requires no argument, to prove that this money was to be paid to promote the election of particular persons, to wit, Gen. Harrison, and the whig candidates for congress, &c.; and a particular ticket, to wit, the electoral ticket in favor of Gen. Harrison for president, and the ticket for whig members of congress, &c. The parties intended to accomplish the very thing which the statute declares to be illegal; no one can wink so hard as not to see it. Every contribution of money "intended to promote an election of any particular person or ticket," is forbidden, except "for defraying the expenses of printing, and the circulation of votes, handbills and other papers, previous to any such election;" there can be little doubt that large sums of money are expended upon elections for other purposes; but the statute says "it shall not be lawful" to do so, and the enactment should either be enforced or repealed.

It is said, that the statute only forbids the contribution of money for *corrupt* purposes. But the statute says nothing about corruption; it declares that the thing shall not be done; with two specified exceptions, it provides, that money "intended to promote an election," shall not be contributed. The legislature evidently thought, that the most effectual way "to preserve the purity of elections," was, to keep them free from the contaminating influence of money; they said, you may contribute money to pay for printing and circulating votes and information, but not for any other purpose. If this contract be void, it is said that money cannot be contributed to hire a room for holding political meetings. That is undoubtedly true, if the object be "to promote an election of any particular person or ticket." I will not discuss the policy of the law; the legislature have said that the thing shall not be done, and that is enough.

Judgment reversed.

(Influencing elections.)

Under the Pennsylvania statute forbidding non-voters from appearing at the election for the purpose of distributing tickets, and of *influencing* the citizens qualified to vote, it has been determined, that the word "influence," means using the party's endeavors, and that it is not necessary, in order to incur the penalty of the law, that such effort should have been successful; for, said the court, in such case, the law would be a dead letter, and no conviction could ever take place, inasmuch as no citizen is compellable to declare how he has given his suffrage. *Respublica v. Ray*, 3 Yeates 65. In Tennessee, the treating of electors, with a view of obtaining their votes, is an indictable offence. *State v. Rutledge*, 8 Humph. 32. In Delaware, the statutes make a distinction between offering and promising a reward to an elector. *State v. Harker*, 4 Harrington 559.

In England, the treating of a voter, with a view of influencing the election, renders it void; and in a recent case it was said by Willis, J., that a thimbleful given with that intent, will avoid the election, but such intent, to have that effect, must be clearly shown. 1 *Chicago Leg. News* 203. It has been held that, to vacate an election on the ground of intimidation and violence at the polls, if the election were not in fact arrested, there must be such a display of force as ought to have intimidated men of ordinary firmness. *Harrison v. Davis*, 2 *Cong. Elect. Cas.* 341. And see *Bruce v. Loan*, *Ibid.* 482.

Under the act of congress of the 31st May 1870, § 19, it has been held, that an indictment for "unlawfully preventing certain qualified voters from freely exercising the right of suffrage" could be sustained, by proof that the defendant and others attacked a number of voters, waiting in line for their turn to cast their ballots, and expelled them from the room, though they afterwards returned and actually voted; the offence was complete by the expulsion of the voters from the polls. *United States v. Souders*, 2 *Abbott U. S. Rep.* 456.

## LAWRENCE v. KNIGHT.

In the Court of Common Pleas of Philadelphia.

SEPTEMBER TERM 1861.

(REPORTED 1 BREWSTER 67.)

[*Injunctions.*]

A court of equity will not restrain, by injunction, a prothonotary from certifying to the board of return judges, election returns which are regular on their face, though averred, and admitted in argument, to be forgeries.

This was a bill in equity praying for an injunction to restrain the prothonotary from certifying to the board of return judges certain election returns, purporting to be the returns of votes cast by soldiers in actual service, at a general election held on the second Tuesday of October 1861, for clerk of the orphans' court of Philadelphia, on the ground that they were mere forgeries.

*Hirst*, for the plaintiff.

*Thayer*, for the defendant.

LUDLOW, J., delivered the opinion of the court. The supreme court of Pennsylvania having to-day decided, at Pittsburgh, to grant the injunction prayed for by the bill filed by Robert Ewing, we cannot do otherwise than grant so much of the prayer of this bill as affects the right of the prothonotary to certify, and return judges to enumerate, the vote contained in a paper, purporting to be a regimental return, with the forged signature of William Schimpfiller appended thereto. We are bound by what we consider to be the decision of the supreme court *in banc* upon this subject, and to that extent (without expressing any opinion as to that portion of the bill) the prayer

(Injunctions.)

of these complainants is granted, on security being entered in the sum of \$1000.\*

Other returns, on their face regular, being company returns, but asserted, and admitted in argument, to be forged, are also attacked in this bill, and the question now presents itself, whether we can, in such a case, grant relief in this form. As we read the opinion of the supreme court, this point is not touched, and therefore, with a painful sense of the responsibility cast upon us, we proceed, as best we may, to determine that question. This bill, although it prays an injunction, and is filed upon the equity side of the court of common pleas, in effect, desires us, in advance, in a court of equity, to settle a series of contested elections; and to determine, collaterally, the rights of certain persons who claim certain offices by virtue of color of title, as it may be called. Has a court of equity such a jurisdiction? We think it must be manifest to the considerate and dispassionate reasoner, that this jurisdiction does not exist.

1. Because every point involved in this issue affects questions appertaining to contested elections, and the law declares the method by which such questions shall be settled. The bill declares that an election has been held, that false and fraudulent returns have been transmitted to the prothonotary, that he is about to transmit them to the return judges, and they are about to cast up the same and deliver and certify certain certificates of election. The whole difficulty arises because of an alleged series of frauds which may lead to contests. Now, the legislature have declared in what method contested elections shall be settled. The prothonotary of the court is merely the agent to send these military returns to the return judges, and they are merely the agents to cast up these returns. It is true, that

\* The law provided for certifying "company returns," but there was no provision for making regimental returns; and therefore, an injunction was awarded to restrain the certifying of such return, admitted to be fraudulent.



## (Injunctions.)

the burden of the contest ought not, in point of fact, to be cast upon an injured person; but the law does not, and for obvious reasons cannot, provide for a contest until it has arisen; if injustice be done, if an outrage have been perpetrated, the law then steps in, and by its appropriate tribunals, declares what shall be done. When the jurisdiction of a competent tribunal attaches, its power is ample, and sweeps over the whole field of controversy; if frauds have been perpetrated at any stage of an election, it at once ferrets them out, and having discovered them, destroys their effect; without special reference to the acts of assembly regulating contested elections, it is enough to say, that in no case can a party be left without a remedy; and therefore, we are brought to the second reason why a court of equity cannot interfere, to wit:

2. Because this court cannot collaterally decide the right of a person or persons claiming an office or offices, under color, as it may be called, of title. To determine, in the present stage of this cause, that this or that return is fraudulent, is undoubtedly to settle now a collateral issue. That this may appear to be a self-evident proposition, look for one instant at the parties defendant in this bill; here are specified the candidates for county, city, judicial and state officers; the question presented now is, not which of these candidates shall receive the certificate of election or the commission, as the case may be, but whether certain returns, which may or may not affect the result, shall be sent to the return judges and be by them computed; can any reasonable man doubt that that issue is purely collateral, and if collateral, can any equity lawyer doubt that a court of equity must withhold its powerful intervention? We have searched in vain for either an analogy or a precedent which would justify us in thus acting.

That this point may appear in a yet clearer light, let us for a moment look at the tribunals designated by law for the settlement of contested elections. If the seats of the law judges be contested, the assembly of Pennsylvania

(Injunctions.)

must settle the question; if the seats of the members of the assembly be contested, each house must judge of the qualifications of its own members; if the seat of the clerk of the orphans' court, or any of the municipal officers, or of the sheriff, be contested, either the court of common pleas or the court of quarter sessions, as the case may be, must determine the result. Suppose, in this condition of affairs, a court of equity steps in, and intercepts a return or returns in the hands of either the prothonotary or the return judges, and hereafter the appropriate tribunals declare that this court made a mistake, and in fact reverse its judgment, who will say that the action of this court was not only collateral, but that the tribunal settling the controversy had not a perfect right to disregard its decision? Thus it will be seen, that we reach an absurd result; for while this court, sitting in equity (having granted a special injunction), must and is proceeding to determine finally whether certain returns are forgeries, the tribunal fixed by law to settle the contested election decides the question and ends the controversy.

3. This view of the subject leads us to declare, thirdly, that should we assume this jurisdiction, we cannot grant final relief. If this proposition be correctly stated, the question is settled beyond the possibility of a doubt. That this view is sound will appear by a little reflection on the subject; suppose we grant this motion, the case does not end here; we must go on and determine finally the questions presented, to wit, whether these returns are or are not fraudulent; and then we must grant what is called the perpetual injunction. Now, how can this decision affect the right of any tribunal having jurisdiction of a contested election, to decide the question? and how, we ask, can this court enforce any decree it may make? Can we declare to the assembly of Pennsylvania, in a contested election, involving the rights of the law judges of this county, that they shall not compute this or that return, even though they should declare the return genuine, when

(Injunctions.)

the law says they shall? Can we, to the legislature, declare, you shall not decide upon the qualifications of the members of your respective bodies, when the law says you shall? Can we, sitting in equity, declare to the courts of common pleas and quarter sessions of this county, you shall not, in any event, compute these returns in any contest which may arise before you, when the law says you may? Can we declare to the select and common councils of this city, you shall not determine the qualifications of your own members, when the law says that you alone shall do it? If, to each of these inquiries, we must answer in the negative, what an improper and unjustifiable exercise of power would it not be, for us to do that which, on the further hearing of this cause, must be either undone or rendered entirely useless!

4. A court of equity cannot entertain this jurisdiction, because it is impracticable, and would lead to a complete overthrow of a system of laws framed for the purpose of settling all controversies of this nature, and founded upon correct principles of public policy. If the complainant in this bill may have this relief, so may every other citizen who supposes his rights have been destroyed, and who may assign any legitimate equitable ground for relief. What then becomes of the duties and responsibilities of the prothonotary and return judges at every election? If one return may be, so to speak, impounded, so may every other; the court must take time to determine the question presented by every bill, and the return judges must either delay action or compute but a part of the vote. Go one step further: the assembly must delay its consideration of a contested election for the law judges, so must the legislature for assemblymen, and the courts of common pleas and quarter sessions for prothonotaries, municipal officers and the sheriff. If these bodies must be thus hindered in the performance of their duties, the commissions of the judges will expire by limitation and vacancies will occur, the sitting members of the legislature will continue

(Injunctions.)

in office, the sheriff who obtains his commission will continue to serve, and the present clerk of the orphans' court must remain in office until his successor is qualified and commissioned. To state this proposition, with its illustrations, is to show, not only that the thing is impracticable, but that the wildest anarchy will follow, and simply because, by an ingenious method, the whole subject has been withdrawn from a legitimate tribunal, and cast upon another not intended by law to be clothed with any such jurisdiction.

If, to all that has been said, it be objected, that a contest will only protract the strife, and that the terms of office will expire before it is settled, we answer, in the language of Judge Sergeant, in *Hagner v. Heyberger*, 7 W. & S. 107, "it is not for us to be wiser than the laws, and for imaginary (nor we may add, real) inconveniences, to abrogate or evade the express enactments of our legislature." We have been, for the most obvious reasons, exceedingly anxious to reach and destroy what, in one instance, is alleged to be a palpable fraud. The whole danger has been that, amid what may perhaps be termed a just popular excitement, we would extend our power beyond its legitimate limit; but, upon deliberate reflection, we have determined to close this opinion in the language of Chancellor Kent, in *Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. 389: "The process of injunction is too peremptory and powerful in its effects, to be used in such a case as this, without the clearest sanction; and I shall better consult the stability and utility of the powers of this court by not stretching them beyond the limits presented by the precedents."

Injunction refused.

---

The limits of the jurisdiction of courts of equity to interfere by injunction in election cases can hardly be deemed fully settled, in view of the conflicting decisions, resulting, perhaps, from the great temptation to a partisan judiciary to use this strong arm of the law to further

## (Injunctions.)

the views of their own political adherents. In *Lawrence v. Knight*, the court refused to enjoin the prothonotary from certifying or the return judges from counting, certain military returns, regular upon their face, but admitted on the argument to be mere forgeries, and this too, though asked for in favor of the candidates of the political party of which the learned judge who delivered the opinion was an honored member. So too, the supreme court of Pennsylvania, in *Hulseman v. Rems*, 41 Penn. St. R. 396 (ante 314), refused to enjoin parties holding certificates of election based upon similar returns, which were evidently forged, from making use of the same; and this decision also, was against the candidates of the party to which a majority of the judges of that court were attached. But in *Miller v. Lowry*, 5 Phila. 202, a majority of the same court that had decided *Lawrence v. Knight*, regardless of their former decision, and utterly ignoring the authority of the supreme court in *Hulseman v. Rems*, enjoined a candidate who had received a certificate of election, regular on its face, from making use thereof, on the ground that it had been fraudulently issued by the return judges, though it was not shown that the party holding the certificate was any party to the alleged fraud; and this injunction was granted in favor of the candidate who was in political accord with the majority of that court. And see *Peck v. Weddell*, 17 Ohio St. R. 271.

An injunction will not be granted to restrain the holding of a municipal election, directed by statute, on the ground of the unconstitutionality of the act; a wrong resulting from an election must be tried before the proper tribunals, or by testing the right of the officers elected, by *quo warranto*. *Smith v. McCarthy*, 56 Penn. St. R. 359. But an injunction will lie to restrain the receipt of votes from a class of persons who are clearly disqualified. *McIlvain v. Christ Church of Reading*, 28 Leg. Int. 126. So, where two bodies of men claimed to be the common council of the city of Philadelphia, an injunction was granted in favor of the one having the *prima facie* title, by virtue of the regular certificates of election, to restrain the other body from interfering with the organization. *Kerr v. Trego*, 47 Penn. St. R. 292; 5 Phila. 229 (post 632). Where the supreme court on *certiorari* has affirmed the decree of the court below in a contested election case, there having been nothing before them but the record, an injunction will not be granted to restrain further proceedings on the merits in the court below, under a petition for a review which was pending and undetermined, when the *certiorari* was sued out. *Gibbons v. Sheppard*, 2 Brewst. 118 (ante 558).

## LAMB v. LYND.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1863.

(REPORTED 44 PENNSYLVANIA STATE REPORTS 336.)

[*Mandamus to elect.*]

A *mandamus* will lie to compel the select and common councils of a city to assemble in joint convention and elect municipal officers, as required by the charter of the city.

It is no valid reason, on the part of the select council, for refusing to meet the common council, that members of the latter body, not legally elected, have been retained, and others, legally elected, have been fraudulently excluded, since each body is the sole judge of the election and qualification of its own members.

This was a petition of Owen Lamb and others, members of the common council of the city of Philadelphia, for a *mandamus* to compel the members of the select council to assemble in joint meeting with the common council, at the next stated meeting of councils, and proceed to the election of certain municipal officers required by the charter of the city.

The petition set forth that it was provided by the 50th section of the act of 2d February 1854, that it should be the duty of the councils of the said city to provide, by ordinance, for the establishment and regulation of all the departments instituted by that act and other laws in force in said city, and such others as might, from time to time, be needful; and that by the 28th section thereof it was provided, that the councils should, in joint meeting, and by *vivâ voce* vote, appoint all the heads of departments, not elective, who should serve for such periods as might be fixed by ordinance. That by certain ordinances of said city, provision was made for the establishment and regulation of the departments of highways, city property and

(Mandamus to elect.)

water; and for the election of a chief commissioner and two commissioners of highways, commissioner of city property, chief engineer of water-works, commissioner of markets, superintendent of city railroads, agent of Girard estate and superintendent of Girard estate; to which ordinances the petitioners craved leave to refer. That by an ordinance passed the 31st January 1862, it was provided, that an election should be held for heads of municipal departments by the select and common councils assembled jointly in convention, on the second Thursday in February in each year; and that the said officers should hold their respective offices until their successors should be duly elected and qualified; but nothing therein contained should be deemed to extend the terms of such officers beyond the month of February in any year. And that by virtue of the said act of assembly and ordinance, it became the duty of the select and common councils to assemble jointly in convention, for the purpose of electing said officers, on the second Thursday of February 1863.

That the common council did, at their stated meeting held on the 5th February 1863, pass a joint resolution providing for the assembling of the said joint convention of councils, according to law, and the same was duly transmitted to the select council, which postponed the consideration thereof until their next stated meeting, which was held on the 12th February, the day on which the elections aforesaid were by law directed to take place; on which day, the select council further postponed the consideration of said joint resolution, and adjourned without taking further action thereon; and at the next stated meeting of the said select council, held on the 19th, a joint resolution to meet common council in joint convention for that purpose, was rejected by the votes of the thirteen members thereof named as defendants; that on the said 19th February, a joint resolution was passed by common council, providing for a joint convention on that day, to be held for the purpose of electing said municipal

(Mandamus to elect.)

officers, and duly transmitted to select council, and the same was postponed in said select council on the same day; whereby vacancies had occurred in the said municipal offices, and it was the duty of councils to meet in joint convention for the purpose of electing persons to fill the same, before the first day of March ensuing, when the terms of office of the then incumbents would expire.

The petitioners further showed that they were members of the common council of the said city, and also residents and tax-payers thereof, and that the select council consisted of twenty-five members. That the said common council were duly organized on the first Monday of January 1863, and had since transacted the public business, and had concurred with select council in passing ordinances which had been approved by the mayor, and had assembled in joint convention with the select council for the election of directors of certain railroad corporations, according to law. That a majority of the members of the said select council, to wit, the thirteen defendants, intended and had so declared, as the petitioners averred on information and belief, not to assemble in joint convention as aforesaid, to perform the duty imposed upon them by law, and that it was their purpose to prevent the election of said officers as required by law, to the great detriment of the city, and contrary to their plain duty as select councilmen in the premises. They therefore prayed that a writ of *mandamus* might issue, &c.

LOWRIE, C. J., delivered the opinion of the court. The performance of official duty may be compelled by the process of *mandamus*; this is not disputed. By the corporate law of Philadelphia, it is made the duty of the select and common councils to meet in joint meeting, and appoint the heads of departments, not elected by the people; and by ordinance, the time for such joint meeting has been fixed. The duty is, therefore, perfectly defined, and ought to be performed; but a majority of select council have



(Mandamus to elect.)

refused to perform it: why should they not be compelled to obey the law, and do their duty?

Those of the defendants who attempt to excuse themselves, set up, that it is not their duty to obey the law, because, as they say, three persons, Isaac Leech, William Meeser and Thomas J. Barger, have been fraudulently retained as members of the common council, though they are not lawfully members thereof, and that the majority have fraudulently excluded two who ought to be members, McCurdy and Duffield, and this, for the purpose of obtaining a majority in favor of one political party, so as to control the elections that were to take place in the joint meeting, and that the defendants have refused to meet in joint meeting, in order to oppose and overcome the said fraudulent attempts, and to compel the common council to correct their organization.

We must, of course, understand the defendants as presenting these allegations as a legal justification of their conduct, and therefore, they must be taken as asserting a legal right to decide who are the proper members of the other branch of the council, though no part of the evidence can ever be properly presented to them, and though the very law under which they obtain their own official position, tells them plainly that each branch is to be the judge of the qualifications and election of its own members. They have not thought of this properly, or they would not have raised this dispute. We have no rule to judge the conduct of the defendants by, but the law; they can have no other rule than this, to guide their official conduct; in affairs wherein they have no official right or authority to decide, they can have no official right to question; officially, they must treat as right, what they have no authority to correct; if this be not true, we have no difference between usurpations and legitimate authority. And this is perfectly consistent with true social liberty, for it is the very nature of man in society, to form habits, customs and laws that are to regulate social conduct, and these naturally vary accord-

(Mandamus to elect.)

ing to different degrees and forms of civilization. True and natural social liberty is, therefore, a liberty regulated by law, and law must be the social rule of conduct, though it is very far from applying to all social conduct; we are free under it, because and in so far as it fits us; and we are free outside of it, in the thousands of acts of our lives, which it does not profess to regulate. But official conduct is never free from law; it is always regulated more or less straitly; it must follow the path prescribed to it; the law of society, and not individual will, is the measure of its freedom; and it is only thus that individual liberty is secured against official arbitrariness.

This plea of the defendants shows, that they are attempting officially to meddle with functions that do not officially belong to them, and to control the action of others over whom they have no authority. They refuse to join those whom the law has appointed to act with them in a particular business, because they think that the law, as actually carried out, has not rightfully appointed their colleagues in the business; they refuse to do their duty, because, in their misapplied judgment, others have not done their duty well. Thus, they undertake to dictate duty to others, and guide their conscience, instead of carefully keeping their own; this is a very common fault, and no doubt will continue to be, until men become better instructed in the law of liberty, and we mean no censure in exposing it. No doubt, the defendants have satisfied their conscience in so acting against law, by appealing to some principle which they suppose to be more obligatory than civil law; but they ought to know, that it is by civil law only that their official duties can be defined, and by civil law we must judge them. If, therefore, they may appeal from that law, we have no tribunal that can try their appeal, and there can be no earthly one to try it, except that which is found in wars and revolution—human force; and surely this is not a more intelligent tribunal than those which the law provides, imperfect as they may

(Mandamus to elect.)

be. An appeal from the law of official duty, except to the law-making power, can be nothing else than usurpation or rebellion or revolution; and we are sure the defendants mean none of these things. In all cases of usurpation and rebellion and revolution, and in all partisan disputes and contests, both parties appeal to other principles than those expressed by the law, and yet the differences continue, until settled by some definite law, very much to the dissatisfaction of men of extreme views. Let men in and out of office criticise and censure official conduct according to the dictates of their skill and prudence; the law allows this; but let them not attempt to correct civil disorders, by a revolution of the law of their office.

It is not pretended, that there is no common council known to the defendants, for it has been acting, for a considerable time, in concert with the select council, in the passage of ordinances, and even in joint meeting for the election of certain functionaries; the reason for their stopping now may be connected with the outside pressure spoken of in the return. And now we may add, that the excuse we have been considering is guilty of the fault of attacking title to office, in a collateral way, which, it is well known, is never allowed. Again, the defendants seek to excuse themselves for disobeying existing law, by saying, that they are about to propose a change of the law, and they offer some important reasons in favor of the change, with which we have nothing to do. But if, because they propose a change of the law, they cease to be bound by it, then the individuals composing the law-making power, may always be exempt from law, because they may always allege a purpose to change, which is absurd; when they actually abrogate it, they are free from it, and not till then; they may change the law *now*, and that will free them from its duty; but the law is in force now, and declares their present duty. We cannot sustain either of the excuses offered.

(Mandamus to elect.)

We think, moreover, that the defendants ought to have verified their return by their affidavits; but that is now an unimportant question in the case.

Peremptory *mandamus* awarded.

---

The doctrine that a municipal body that is authorized by statute to judge of the election and qualification of its own members, is the exclusive judge thereof, and that the courts have no jurisdiction in the premises, is re-affirmed in *Commonwealth v. Leech*, 44 Penn. St. R. 332; and the same conclusion was arrived at in *Commonwealth v. Loughlin*, 20 Leg. Int. 100; and *Commonwealth v. Barger*, Ibid. 101. (And see *Commonwealth v. Garrigues*, 28 Penn. St. R. 9; *Commonwealth v. Reed*, 18 Pittsburgh Leg. Journal 131.) But in none of these cases is there any reference to the older decision of the supreme court of Pennsylvania, in *Commonwealth v. McCloskey*, 2 Rawle 369 (ante 196), where it was held, that such a grant of power did not oust the jurisdiction of the courts in *quo warranto*; and the same principle was involved in *Commonwealth v. Small*, 26 Penn. St. R. 31. The modern decisions appear to be founded on the idea that, as the two branches of the legislature are the judges of the election and qualification of their respective members, to the exclusion of the judicial department, therefore, the grant of a similar power to a municipal corporation, will carry with it a similar exemption from judicial revision; but it must be remembered, that the power residing in the legislative bodies is granted to them by the constitution, and that, being a co-ordinate branch of the government, their decision upon a question clearly within their jurisdiction, must be necessarily exclusive; a municipal corporation, however, is the mere creature of the law, and to hold that a grant to them of the power to judge of the election and qualification of their own members, necessarily carries with it the constitutional privilege of the legislature of being exempt from the judicial supervision of the courts, would appear to be a strained construction of the law. See *Kerr v. Trego*, 47 Penn. St. R. 295 (ante 635). And the point can hardly be deemed a settled one, until *Commonwealth v. McCloskey* be formally overruled. The power of a court of last resort to overrule a solemn decision of their own, made upon full argument, is, at best, of doubtful propriety; it is well known that, in England, the House of Lords does not possess the power to overrule

(Mandamus to elect.)

a former decision of the house, the only remedy being the passage of an act of parliament, changing the law ; and it would add much to the respect which ought to be entertained for such a tribunal, if our own courts of last resort were subject to a similar restriction. We have had some lamentable instances, of late years, of the overruling of former solemn decisions, on a change in the political majority of courts, which has much lessened the respect formerly entertained by the people and the profession for their judgments.

If the president and board of trustees of an incorporated town have neglected to give the requisite notice for holding the annual election for the new board, within the year for which they were elected, as required by law, and refuse to do so afterwards, they will be compelled to perform their duty, by *mandamus*. People v. Town of Fairbury, 51 Ill.

149. *People ex Rel Walker v Board of Governors of Albany Hospital 11 Abb N.S.*

## KERR v. TREGO.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1864.

(REPORTED 47 PENNSYLVANIA STATE REPORTS 292.)

[*Organization of municipal legislative bodies.*]

The test for ascertaining which of two divisions of a municipal legislative body represents the legitimate social succession, is, which of them has maintained the regular forms of organization, according to the laws and usages of the body, or, in the absence of these, in accordance with the laws, customs and usages of similar bodies, in analogous cases.

Where an ordinance of the common council of Philadelphia provided that the clerk and assistant-clerk should continue in office until the organization of the new council, and until their successors should be duly elected; and at the organization of a new council, there were present twenty-three members whose term of office had not expired, including the president of the preceding year, who with the clerks were in their usual places at the time appointed for the organization of the new council; it was held, to be the right of the said officers to organize the council by first calling the roll of the members holding over, and then requiring the members elect to present their certificates of election, that their names might be enrolled; and that any interference therewith was irregular and improper.

The certificate of election, sanctioned by law or usage, is *prima facie* evidence of title to the office, and can only be set aside by a contest in the forms prescribed by law.

Any interference with the due organization, by a division of the body, claiming to be the common council, will be restrained by injunction.

This was a bill for an injunction exhibited by Wilson Kerr and others against Charles B. Trego and others, setting forth that the complainants had been, since the first Monday of January 1862, members of the common council of the city of Philadelphia, and that their terms of office would not expire until the month of January 1864; that Wilson Kerr was duly elected president of the said body on the first Monday of January 1862, and had since acted as such. That it was the duty of the said continuing members of council to receive, at the city-hall, on the

(Organization of municipal legislative bodies.)

first Monday of January 1863, the new members thereof, with a view to the due organization of the common council; and for that purpose the complainants, together with the clerk and assistant-clerk of the preceding year (the said Wilson Kerr acting as president), met at the time and place appointed by law, and admitted and received certain members of the said council, who presented themselves for that purpose, and who had been duly elected as such at the last general election, and with the newly-elected members, composing a quorum of the whole body, duly organized the said body as the common council of the city of Philadelphia.

That ten of the defendants, improperly and illegally acting in concert with the other defendants, by a pre-arranged plan, did, at the time and place appointed for the assembling of the said body, and whilst the said Wilson Kerr was in the chair, and duly acting as president, and whilst the other complainants were duly assembled to receive the newly-elected members, clamorously and illegally interfere with the proceedings of the complainants, composing the said common council, and did, by disorderly and violent outcries, proclaim Charles B. Trego, one of the defendants, president, and Gordon and Stewart clerks of their meeting or assembly; and did attempt to and did interrupt the regular and orderly transaction of the business of the said common council, and by such conduct did endeavor to prevent the complainants from duly acting in the matter of deciding upon the qualifications of persons claiming to be members of common council, and of considering and deciding upon the claims of certain contestants to seats therein. And at the next stated meeting, the defendants did again intrude themselves into the council-chamber, and continue to act as and call themselves the common council of said city, and intended as such to pass laws and ordinances for the government thereof. And the defendants threatened and intended to continue so to intrude, and to interfere with and prevent

(Organization of municipal legislative bodies.)

the orderly and lawful transaction of the public business. That the defendants threatened and intended, in pursuance of their said usurped and illegal action, to pass resolutions and ordinances appropriating the public moneys, and to direct their clerk to draw orders upon the city treasurer, and to present such orders to the city controller for allowance and payment out of the city treasury.

The complainants moved for a preliminary injunction to restrain the acts complained of in the bill. The motion was heard, on affidavits, the defendants contending that, in consequence of frauds in the election of certain members, recognised by the complainants, the Kerr branch of the common council had not a quorum of members, and were, therefore, without power to elect officers or transact business; that Mr. Kerr had no authority to call council together; and that the printed list of members prepared by the clerk, containing, as it was alleged, the names of at least two persons who were not legally elected, showed an intention to admit them as members of council.

*Porter and Wharton*, for the complainants.

*Sellers, Gibbons and Gilpin*, for the defendants.

LOWRIE, C. J., delivered the opinion of the court. On account of the immense importance of this case to the city of Philadelphia, we all consented to sit together at the hearing of this motion for a preliminary injunction, hoping that we might thus bring to a speedy termination this very unpleasant difficulty. We have heard and carefully considered the case, and now proceed to pronounce the judgment of the law upon it, without expressing any opinion upon the merits or demerits of any of the parties to it, beyond what is necessary to the decision of the very point of the controversy; we shall neither approve nor disapprove here what we have no authority to judge. Some objections were made to some of the minor details



(Organization of municipal legislative bodies.)

of the bill, but we say nothing about them, for they may be amended at any time, and it is sufficient, on this motion, that the main features of the case are so fully set forth in the bill and affidavits as to justify the motion. It is clearly alleged and shown, that there are two bodies which claim to be regularly organized as the common council of the city, and each is proceeding to act as such, to the great detriment of the public interests; this is the wrong that is to be remedied; one or the other party must be wrong; they cannot both be right.

1. Have the courts authority to redress this wrong? We think they have. All bodies, except the supreme legislature, are *under law*, and therefore, for all transgression of law, are subject to the authority of the judicial power established by the constitution. The corporation itself is subject to this authority, so far as its acts are directed by law; though it is not, and cannot be so, in so far as it is itself a law-making power; in so far as its judgment and direction are uncontrolled by the law of the land, it is free from the control of the courts; but in so far as its acts are directed by law, it is subject to the judicial authority; much more, then, are its officers subject to this authority, and especially those that pretend to act as its officers without right; and as there cannot be two common councils, one of these bodies must be a mere pretender to the right to act as such.

2. May the wrongful body be restrained from acting, by means of the equitable remedy of injunction? We think it may; this remedy extends to all acts that are contrary to law, and prejudicial to the interests of the community, and for which there is no adequate remedy at law; and we can hardly imagine any act that more clearly falls within this description, than one that casts so deep a shade of doubt and confusion on the public affairs of a city as this does. In such a case, no remedy is adequate that is not prompt and speedy as this one; if a private partnership or corporation were to fall into similar confu-

(Organization of municipal legislative bodies.)

sion, affecting all its members and all its creditors, we can think of no better remedy than this, for staying the confusion that would be caused by two opposite parties pretending to act as the society. It is the very remedy usually adopted, when churches divide into parties, and we have applied it in three such cases, in the last year; therein we decided directly on rights of *property*, because that became the aim of dispute; here we must decide on the right to public *functions*, because that is here the purpose of the dispute. The main question, in all such cases, is regularity of organization; and the right to functions and property is a mere consequence of this.

3. May one of the conflicting bodies, or the members of it, maintain this action against the other? We think they may; this could not be doubted in relation to private corporations and partnerships; but it is argued, that, in relation to public corporations, the attorney-general alone can file such a bill; we do not think so: it is right for those to whom public functions are entrusted, to see that they are not usurped by others. Either of these bodies has the right to demand of the courts that it, and the interests of the public alleged to be committed to it, shall be protected against the usurpation of the other. We decided a similar principle in *Mott v. The Railroad*, 30 Penn. St. R. 9, and we need say no more about it now. This case is, therefore, regularly before us, and we proceed to the consideration of it, premising that there is no material fact in dispute, and that we have no authority to decide directly upon the validity of the election of any one of the claiming members.

4. In all cases of this kind, at least, in all bodies that are *under law*, the law is, that where there has been an authorized election for the office in controversy, the certificate of election, which is sanctioned by law or usage, is the *primâ facie* written title to the office, and can be set aside only by a contest in the form prescribed by law; this is not now disputed. No doubt, this gives great power

(Organization of municipal legislative bodies.)

to dishonest election officers, but we know no remedy for this, but by the choice of honest men; when party fealty is a higher qualification than honesty or competency, we must expect fraud and force to rule, and a man must be an Ajax or a Ulysses to be qualified for office.

5. On the division of a body that ought to be a unit, the test of which represents the legitimate social succession is, which of them has maintained the regular forms of organization, according to the laws and usages of the body, or, in the absence of these, according to the laws, customs and usages of similar bodies in like cases, or in analogy to them. This is the uniform rule in such cases; it is always applied in the case of church divisions, and was so applied by us three times, last year, in the church cases already alluded to. The courts can never apply it to divisions in the supreme legislature, because that body is subject to no judicial authority, and cannot be; they, too, ought to adhere to this rule, for order and regularity are always worthy of respect, and especially so, in cases where there is no authority that can enforce their claims. But we need not dwell on this point, for it is admitted, that this rule is the test of legitimate organization.

6. Judging by this rule, was the Kerr body legitimately organized? We think it was. The undisputed facts are, that there were twenty-three members, including the president last elected, whose terms had yet a year to run; that the clerk and assistant-clerk were still in office, having been elected under a yet existing ordinance of 5th May 1855, § 6, that declares, that they shall continue in office until the organization of a new common council, and until their successors shall be duly elected; that on the day and at the hour appointed by law for the organization of the new council for this year, the president and clerks elected last year were in their usual places, and then and there proceeded first to call the roll of all the members whose terms of office had not yet expired, and then to call on the new members to present their certificates of

(Organization of municipal legislative bodies.)

election, that their names might be enrolled. It seems strange to us, that any one should doubt the strict regularity of this proceeding. It has the sanction of the common usage of every public body into which only a portion of new members is annually elected; it is the periodical form of re-organizing the select council and the senate of the state, and also the form of organizing the senate of the United States on the meeting of a new congress, when the vice-president does not appear, and the last president *pro tempore* does; and we understand this custom to be uniform throughout the United States, though this is not very important. And when there is a president whose term as a member has expired, then the functions of the clerks continue, and they, in all cases, act as the organs of re-organizing the body, and continue to hold office, until their successors are chosen and qualified; our state and federal houses of representatives are illustration enough of this. So universal is this mode of organizing all sorts of legislative and municipal bodies, that all departures from it can be justified only as founded on special and peculiar usages, or on positive legislation. Whenever this form is adhered to, a schism of the body becomes impossible, though the process of organization may be very tardy. This council has existed only one year in its present form, and therefore is without any binding usage of its own on this matter. In all cases where part of the public body remains, and is to be completed by the reception of new members, it remains as an organized nucleus, and in its organized form, it receives the new members, and then proceeds to the election of new officers, if any are then to be elected. The old nucleus is not dissolved by the incoming elements, but these are added to it, and then the whole body proceeds to the exercise of all its functions.

7. It is objected, that a rule that attributes so much power to the officers of the previous year, gives them an advantage which they may use arbitrarily and fraudulently

(Organization of municipal legislative bodies.)

against the new members, so as to secure to themselves an illegitimate majority. No doubt, this may be so; but no law can guard against such frauds, so as to entirely prevent them, just as it cannot entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the processes of an election or organization. But so much the more need for order and law in this part of the process; the law *can* dictate that, though it cannot furnish honesty and sound judgment to the actors in it. That the law and order which we have announced have existed so long and so generally, is proof, at least, that they are better than no law at all.

8. Was the Trego body regularly organized? Because both cannot be regular, and the other is, this, of course, cannot be so. But the fact appears clearly and positively, that it was not regularly organized; as the regular officer was proceeding to organize, some one moved, with a loud voice, that Isaac Sulger should act as clerk, and the same voice put the vote, and it was carried by those who liked the motion, and Isaac Sulger proceeded, as temporary clerk, to organize the party to which he belonged; all the other members treating this proceeding as disorderly; and so it was: in such matters the race is not to the swift, nor the battle to the strong or loud-voiced, but to the orderly. The proceeding was opposed to their own written law with regard to the clerks, and to common usage otherwise, as we have already explained. This is so much like the disorders that occurred in the house of representatives in 1838, and produced a dangerous schism there, which lasted several weeks, that it hardly needs an opinion from us to condemn it. The disorderly body in that case was dissolved by the force of public opinion, and the members returned and took their places in the regular body, which, by their own fault, they had no hand in organizing. We allude to the merits of that case only in so far as they relate to the *order of the proceeding*, which is the point here.

(Organization of municipal legislative bodies.)

9. It is objected, that the plaintiffs have no equity to support this motion, because, as the defendants believe, they intended to use their power fraudulently, so as to admit persons not elected, and to exclude some that were; and the principal evidence of this purpose is, that the clerk had procured printed slips containing a list of all the members, including the disputed members of the Kerr side, and excluding one on the other side, who had been, it is said, wrongfully removed. We cannot say that all this is a bar to the motion; for the right to it does not depend upon the merits of the nominal parties to this suit, but on the right of the public to have their regular organization protected, so that the public business may proceed with security and certainty. Moreover, we cannot condemn the course of the clerk; we suppose it is not unusual for the clerk to prepare such lists for such an occasion; and we cannot say that there was any fraud in them, without deciding upon the election of some of the members, which is beyond our authority in this proceeding. Possibly, the result of this view of the law will be, that the Kerr body will make an unfair use of their power, in the reception of the other members, as has been suggested; for each party charges the other with having admitted members that were not duly elected, and the learned counsel here have not denied this. But we know of no cure for this, but the improvement of our human nature; this court cannot prevent it, without an unauthorized interference with and direction of the organization of the body; we must trust them, where the law trusts them. We declare which body has proceeded in regular form, and having done so, we may not say how it shall act afterwards; it has a law directing that; we need not even say how far the act of organization has proceeded; it was regularly commenced and carried on, and no irregular body can be allowed to interfere with it, at any stage of its work. And we can see no propriety in our interfering to save those who have initiated

(Organization of municipal legislative bodies.)

an abortive revolution, from the temporary loss of power, which may possibly result from their defeat. It may be, that they have passed the time for contesting disputed seats, but we cannot help that; we did not make their election law, and we cannot alter it; and equity can hear no one who alleges his own wrong as a ground of relief. It is not possible for us to impose terms wisely, without trying ourselves all the disputed seats, which, as we have said, we cannot do. If there were before us a yet undetermined question, the determination of which might change the result, and restore the other party, we would impose terms for speeding the trial of that question, as we did, last fall, in the sheriff's case; but there is no such question in reserve here. The efficiency of our action is in the declaration that the Trego organization is without right, and the granting of the injunction is little more than the form of putting this declaration on record.

Injunction awarded.

READ, J., dissented, 5 Phila. 229.

---

The legislative precedent of 1838, referred to by the learned judge in his opinion, constitutes the most remarkable attempt to overthrow the legitimate state government, that has occurred in the political history of Pennsylvania. The facts preceding and growing out of the organization of the house of representatives in that year, are succinctly and plainly stated in a report made to the house, on the 18th June 1839, by a committee of investigation, through their chairman, James Ross Snowden. From this report we learn that, owing to dissensions in the democratic party, at the election of 1835, Joseph Ritner was elected governor, by a minority of the people of the state; that in 1838, the party in power sought, by every means, without regard to fairness or honesty, to perpetuate their hold upon the state government; and the general election having demonstrated the fact, that David R. Porter had received a majority of the popular vote for governor, and that the democratic party had elected a majority of the house of repre-

(Organization of municipal legislative bodies.)

sentatives, a corrupt conspiracy was entered into by certain high officials, to defeat the will of the people, by organizing the house of representatives with a majority of spurious members, and with the assistance of the senate (which contained an adverse majority), and the concurrence of the governor (who held over for a few weeks after the meeting of the legislature), to contest the election of Governor Porter, to elect Thaddeus Stevens to the office of United States senator, to elect a state treasurer and canal commissioners, and if they could not succeed in so moulding the returns for governor as to declare Joseph Ritner re-elected, then to pass laws by which the patronage of the incoming governor would be, in a great measure, taken away. In pursuance of this conspiracy, Thomas H. Burrowes, secretary of the commonwealth, as chairman of the state central committee, shortly after the general election, issued an address to the friends of Governor Ritner, in which he exhorted them "to treat the election as if they had not been defeated, and in that attitude abide the result."

It was evident, that the organization of the house of representatives depended on the returns from the county of Philadelphia, and to this the conspirators turned their immediate attention; the grossest frauds had been practised at the election in the district of the Northern Liberties (under the registry law then in force), in consequence of which the board of return judges, composed of seventeen members, after a full investigation, rejected the returns from that district, which, however, made no difference in the result of the election, so far as regarded senators and members of the house of representatives, and the majority of the board, consisting of ten members, made out and signed a certificate of election for the persons appearing to have the highest number of votes, after which they adjourned *sine die*. During all this time, and up to the adjournment, no disposition was manifested by the minority judges to make out separate returns, and when the adjournment took place, no such intention was expressed; but at a subsequent period of the same day, six of these minority judges convened in another part of the building, and having procured the attendance of one of the clerks, made out other returns, in which, however, they did not certify that their candidates were elected, but that they appeared "to have received the number of votes set opposite their respective names."

These returns thus clandestinely and fraudulently made out, were immediately handed to John G. Watmough, the sheriff of the county,



(Organization of municipal legislative bodies.)

and by him forwarded to Thomas H. Burrowes, the secretary of the commonwealth, by a locomotive prepared for the occasion. Though the sheriff affected to consider these the true returns, he acknowledged in his testimony before the committee, that he was cognisant of there having been another return made out by a majority of the judges, in the mode pointed out by law, and also that he knew the fact that the democrats had a majority in the county of Philadelphia. The returns of the majority judges were disposed of as directed by law, one copy being deposited in the prothonotary's office, and another (under a sealed cover, directed to secretary of the commonwealth) deposited in the nearest post-office; these returns duly reached the secretary, by course of mail, and were in his possession previously to the meeting of the legislature. Yet, with a full knowledge of all these facts, Thomas H. Burrowes, the secretary of the commonwealth, at the assembling of the legislature, withheld from both houses the returns of the majority judges of the county of Philadelphia, and sent in the minority returns only:

At the time appointed for the assembling of the legislature, Francis R. Shunk, the clerk of the former house of representatives, proceeded to organize the house, in accordance with the immemorial usage of the commonwealth, when the persons named in the minority returns from the county of Philadelphia, appeared and claimed their seats as members of the house; the minority returns sent in by the secretary of the commonwealth having been read by the clerk, one of the members elect from the county of Philadelphia presented a copy of the returns signed by the majority judges, duly certified by the prothonotary, which was read by the clerk in connection with the minority returns received through the channel of the secretary's office. In the course of these proceedings, Thaddeus Stevens, a member elect from Adams county, who held a similar certificate of election to that presented by the members from Philadelphia, rose and made a motion (contrary to the practice observed in the organization of the legislature of Pennsylvania, since its existence as a commonwealth) that tellers should be appointed for the purpose of electing a speaker; a departure from the custom so long prevalent of calling upon the clerk of the former house to superintend the election of speaker, and to announce the result. Mr. Stevens himself put the question, decided his motion to be sustained and named the tellers, who ascended the platform, and held an irregular and informal election; this was followed by the tellers calling out the names.

(Organization of municipal legislative bodies.)

of the eight pretended members of the county of Philadelphia, and concluded by the announcement that Thomas S. Cunningham had been elected speaker of the house; Mr. Cunningham then ascended the platform, drew from his pocket a Bible furnished him for the occasion, and after the form of an oath had been administered to him, qualified his associates, when this self-constituted house adjourned.

During this time, the democratic members of the house, 56 in number, proceeded, in the mode prescribed by law, to the election of a speaker, who was duly qualified, and after administering the oath of office to the other members, the house adjourned. The spurious house of representatives kept up their organization for several weeks (the senate, which was in political accord with the seceders, refusing to recognise the legitimate organization), and these unprecedented proceedings having naturally called together a great multitude of the citizens of the commonwealth at the seat of government, the governor made their presence a pretext for calling out the military, ostensibly for preserving the peace, but really for the purpose of overawing the house of representatives (from which circumstance, and the fact that orders were issued to the troops by the commanding-general, to load with buckshot, this episode in our history is generally known as the "Buckshot War"); this body, however, continued to meet, from day to day, in the hall dedicated to the purposes of legislation, having constantly a quorum, until, on the 17th December, they received an accession to their numbers, in the persons of three of the adherents of the other party, who, under a solemn conviction of duty, left the seceders who were following in the wake of Thaddeus Stevens, presented themselves to the legitimate house of representatives and took the oaths required by law. The other members of the seceding body refused to take their seats or to enter upon the discharge of their duties, until the senate was compelled by public opinion, on the 25th of December, to recognise the legitimate organization, when they successively returned to the post of duty, with the exception of their leader, Thaddeus Stevens, who returned the trust confided to him into the hands of his constituents.\*

---

\* After a lapse of some weeks, Thaddeus Stevens appeared and claimed his seat, but the house decided, that by his conduct, and especially by his address to his constituents, he had virtually resigned the same; they therefore declared his seat vacant, and ordered a new election, at which Mr. Stevens was again returned.

## (Organization of municipal legislative bodies.)

The committee, from the facts before them, came to the following conclusions, which they presented to the house :

1. The difficulties which took place at the seat of government, on the 4th day of December last (the day appointed for the meeting of the legislature), had their origin in a fraud concocted by certain federal return judges, in the county of Philadelphia, with the advice and co-operation of William B. Reed, the attorney-general of the commonwealth, and John G. Watmough, the sheriff of the city and county of Philadelphia, by which the regularly-elected members of the house of representatives, were iniquitously attempted to be deprived of their seats ; a fraud which Thomas H. Burrowes, secretary of the commonwealth under Governor Ritner, and Thaddeus Stevens, one of his canal commissioners, and a member of the house from Adams county, attempted to consummate, the former by suppressing the legal election returns of said county, and the latter, by attempting to organize the legislature in a manner unknown to the constitution and laws.

2. No necessity existed, at any period, for calling into service the military ; on the contrary, such call was made by ex-Governor Ritner, in the absence of every semblance of necessity, and was manifestly a stretch of power, in derogation of the plainest dictates of law, justice and humanity.

3. If, in point of fact, there was such a disturbance at the seat of government, as is alleged, then, it was clearly the duty of those in power, to call upon the civil authorities to suppress it ; the law points out the mode, and Governor Ritner's attorney-general advised that course to be taken ; no such application was made, although the courts of justice and officers of the law were in the free and undisturbed exercise of their usual duties ; the constitution ordains, that "the military shall, in all cases and at all times, be in strict subordination to the civil power ;" the order, therefore, calling out the troops, was unconstitutional and illegal ; and there being no necessity for their presence at the seat of government, the conclusion is irresistible, that they were called into service, to aid and assist the enemies of republicanism, in organizing a legislature, in violation of the constitution and laws, and contrary to the wishes of the people of this commonwealth.

An impressive lesson for the people of the present day !

## DUFFIELD'S CASE.

In the Court of Common Pleas of Philadelphia.

DECEMBER TERM 1862.

{UNREPORTED.}

[*Ouster.*]

Where a member of a municipal legislative body, has been expelled, without notice or hearing, a *mandamus* will be granted to restore him, on notice and hearing.

But where the council has determined, that the member has incurred a disqualification, by accepting a federal office, the court will not interfere.

This was an alternative *mandamus* at the suit of Thomas J. Duffield, to restore him to his place and office as a member of the common council of the city of Philadelphia, from which he had been expelled without notice or hearing.

*Phillips* (with whom were *Cassidy* and *Wharton*) for the respondents, moved to quash, on the ground that there was nothing in the suggestion which justified the issuing of the writ; that it showed upon its face the relator's incapacity to hold the office; and that the court was without jurisdiction, as the council was the sole judge of the qualifications of its members.

*Sellers, F. C. Brewster* and *Gilpin*, contra.

THOMPSON, P. J., delivered the opinion of the court. The writ of *mandamus* is brought as a writ of right, by a party whose office has been taken from him by the act of the respondents; and the simple question is, first, whether the court has the power to redress the alleged injury; and secondly, is this the proper way to do it?

The legislature cannot create a body with judicial powers, except under the forms of law, and under the con-

(Ouster.)

trol of law, else they would have the right to take away the powers of the courts. If the legislature designed (which I do not think they did), to authorize a municipal body to exercise judicial powers outside of all law, such authority would be judged to be out of the pale of the constitution. In this case, it is alleged, that this power is given to council, to judge without reference to any court, and in the face of any adjudication by any court. If this be so, I have only to say, that we have advanced considerably since the time of Cromwell; in his time, in the case in Stiles, which has been cited, it was ruled, that a man must be heard before being condemned. I would be sorry if we had failed to do that which, in common justice, seems to have been required as long ago as Cromwell's time; even under his stern rule, he brought his officers into court, to answer why they removed a man without hearing. An act of assembly that says that a body shall try a man, without a hearing, and without giving him a day, would be unconstitutional. The court cannot determine what decision shall be made, and it has never attempted to do so; nor has the supreme court or any court in this commonwealth attempted to do so; but the court is bound to protect citizens, by seeing that the law, as applicable to their case, is fairly and properly administered. The supreme court has, in a recent case, decided, that they cannot require this court to decide in any particular way, but they can require the court to go on and decide. There may be no written law which says, that a man may be present in a case like this, but there is a law, written upon the conscience of every man, which dictates to him the principle, that no man shall be deprived of his life, his liberty, his property or his office, without the opportunity of knowing that he is called upon to defend his rights.

Upon this ground, and without attempting to say, at present, whether the council had any reason to act as they did, we do say, that in doing what they did, they

(Ouster.)

ought to have acted in strict conformity with the law of the land, have given notice to the member that a charge was made against him, and have given him an opportunity to come in and defend himself. It is admitted, that no such opportunity was given, and therefore, he had no knowledge of what was going on; it was done without a hearing, and without a charge being made. This is a case where the court ought to interfere on behalf of the citizen, or we may have a state of things where the citizens will defend their rights, not by a *mandamus*, but by the strong arm. We say you shall not do this, unless you do it in strict accordance with the terms of the constitution.

The motion to quash is overruled. ,

The defendants, thereupon, filed a return and answer, setting forth, that Thomas J. Duffield held an incompatible office, being inspector of clothing at the United States arsenal, and having received such appointment from a "Head of Department," to wit, the secretary of war; and that in declaring his seat vacant, they acted in the exercise of their legislative duty, as councilmen, for which they could not lawfully be questioned in any other place; and they submitted that, if their action was irregular for want of notice to the relator, inasmuch as they were desirous of conforming to the decision of the court, and of doing their whole duty in the premises, they were willing forthwith to rescind the resolution complained of, and to proceed to inquire into, judge and determine the question of the alleged disqualification of the relator to be a member of the said common council.

*F. C. Brewster*, for the relator, upon the presentation of this return, moved for judgment, and the allowance of a peremptory *mandamus*.

*Phillips and Wharton*, contra.

(Ouster.)

THOMPSON, P. J. This case is a peculiar one; the return sets forth certain facts, and concludes by suggesting that the parties are willing to submit to what is supposed to be the law, as announced by the court; it presents the case in a double aspect. Upon the coming in of this answer, the relator's counsel have asked for a peremptory writ, in view of the insufficiency of the return; that, according to our practice, is not strictly in form; in the case of *Commonwealth ex rel. Thomas v. County Commissioners*, 32 Penn. St. R. 218, it has been ruled, that the practice has been changed by statute, and that "an unsatisfactory return is required to be replied to, by demurrer, plea or traverse; under our statute, the case then assumes the form of an ordinary action at law, and all questions properly arising are to be tried in the same manner as was formerly done at common law, in an action for a false return; if judgment be given for the party suing the writ, a peremptory writ of *mandamus* issues, without delay, as if the return had been adjudged insufficient; at common law, a judgment is not necessary to support the peremptory writ; under our statute it is. Such, in brief, is the statutory mode of proceeding in suits of *mandamus*; and because it is expressly enjoined by the act of 14th June 1836, and necessary also for the sake of the symmetry of the record, we shall treat the motion and argument made on behalf of the relator, as a demurrer to the return of the respondents, and proceed to consider the case, as if it had been entered in form." That is precisely the course we intend to pursue here; where a motion is made to disallow, the court will take it to be as if demurred to.

The answer does not set out matters which are material to the case; they are entirely immaterial. It is admitted, that there was no hearing. No demurrer that we can conceive of, would better present the case upon that point, and that is the only point that we consider important; and therefore, we determine to consider this as a demurrer,

(Ouster.)

so that the record may be correct, and we decide the case upon the sufficiency of the demurrer. If the supreme court has made a mistake in this respect, we but follow their decision. It is admitted upon the face of the answer, that this did take place, when the relator was not present, and when he could not enter his defence; he was, therefore, improperly and illegally removed. It is no answer to that, to say, that the facts upon which the motion was made can be established; it is too late to take that position; the party must be restored to his rights, before there can be any justification; we must restore him by act of law, to which he has appealed. There is another ground upon which the court feel justified in deciding this motion; we think this answer amounts to a submission to the action of the court; the parties state certain facts, and then say, we admit that we ousted this relator, and we will put him back; that is saying to the court, "we submit ourselves to whatever action the court pleases to take, although we assert that there are certain facts which would justify our action." They say they will undo that which they have done. If they are actuated by that sense of right which the law has enabled them to comprehend, and are willing to restore, it is the duty of the court to enforce that restoration. The writ is allowed.

Peremptory *mandamus* awarded.\*

After the delivery of this opinion, and the restoration of the relator, the council appointed a committee to examine and report whether or not Thomas J. Duffield had not vacated his seat as a member of common council, who, after hearing the case (Mr. Duffield attending with his counsel), reported that inasmuch as Thomas J. Duffield had accepted an office under the government of the United States, incompatible with that of councilman of the city of Philadelphia, he had thereby resigned his seat as councilman and that the same was vacant. This report was accepted on the 31st December 1862, and the seat of the

\* This judgment was reversed in the supreme court, for irregularity.



(Ouster.)

said Thomas J. Duffield was thereupon declared to have been vacated. The relator thereupon petitioned the court of *nisi prius* for a writ of *mandamus* to restore him to his office.

LOWRIE, C. J., delivered the opinion of the court.\* On the 4th of December last, the common council of Philadelphia declared the seat of Thomas J. Duffield vacated, because he had accepted an office of trust and profit under the United States, to wit, the office of general superintendent of the clothing depôt of the United States arsenal; but he was restored by a *mandamus* from the common pleas, because the common council had proceeded without notice, and perhaps for other reasons; and afterwards, the judgment of the common pleas was reversed in this court, because of irregularities in the proceeding there, no other question being then decided here. After his restoration, the common council proceeded in more regular order, and removed him again; he now applies to this court for a *mandamus* to restore him, on the ground that the office held by him is not incompatible with the office of councilman. Along with other matters, raising a question of disputed fact, not now to be discussed, the councilmen, in their return, claim that their act in vacating the relator's seat, is not subject to review and correction by the courts, and to this the relator demurs; and this raises the question of law, whether we have authority to interfere. It is the only question now to be discussed.

The common council removed the relator, because, during his term as councilman, he had accepted an office under the United States, and because they supposed that he had thereby become disqualified to exercise the office of councilman; and they justify the reason assigned, by referring to the charter act of 2d February 1854, § 4, which says, that "the members of the common council shall have the same qualifications as are required by the

\* Reported in 20 Leg. Int. 100.

(Ouster.)

constitution for members of the house of representatives;" and to the constitution, Art. I., sect. 19, which says, leaving out irrelevant words, that "no person holding any office under the United States, shall be a member of either house (of the assembly) during his continuance in office." Putting these two clauses together, *mutatis mutandis*, they may read thus, "no person holding any office under the United States, shall be a member of either council during his continuance in such office." This is the law under which the common council acted in removing the relator, and which they applied to his case.

We have, therefore, no difficulty in defining the function which the council was exercising when it removed the relator; it was judging of the qualifications of its members. The question of holding an incompatible office (as well as those of age, residence and citizenship), is always a question of qualification, and is everywhere so spoken of; and this question may be raised at any time, as well after the person elected has been sworn into office, as before. In nearly all the cases cited in the argument and referred to in the case of *Commonwealth v. Binns*, 17 S. & R. 219, the question was not raised until after the officer had been inaugurated, and very often the incompatible office is accepted during the continuance of the one in relation to which the question of qualification arises. The case is, therefore, quite distinct from one of contested election, or of expulsion for misbehavior in office or for the commission of some infamous crime.

What, then, is the tribunal that is to decide whether a councilman has become disqualified, by the acceptance of an incompatible office? The answer to this question is found in the charter act of 1854, § 35, which declares, that the respective councils "shall, in like manner as each branch of the legislature, judge and determine upon the qualifications of their members." The proper council has judged and determined this question of qualification; and now the question is raised, what authority have the

(Ouster.)

courts to interfere, so as to review, and, if necessary, correct their decision? No doubt, the functions and authority of the courts do extend to all questions of right arising between private persons, and between private persons and corporations, and in the management of private corporations; and this cannot be changed by the legislature, because it is declared by the constitution, in providing for the judicial department, and assuring to every one a remedy by due course of law. It is founded on the principle, that it is necessary for the order of society, and for the security of persons and property, and that for every wrong, which society recognises as a wrong, there should be a remedy in some regular and established form. But though the courts have this general and indefeasible authority, they never feel themselves entitled to exercise it, when the parties to the question have provided a mode of their own for settling their differences, unless that mode prove inadequate, for they could not do it without violence to the proper arrangements of the parties. In other words, society does not need to interfere by its courts and remedies, when the parties have provided a sufficient tribunal of their own; and no question for the courts is considered as being properly raised, unless the private remedy has, in some measure, failed in its purpose.

Thus, when parties submit their differences to arbitrators, and an award is made, the courts do not try the case over again; but only enforce the award, if that is necessary. And so in regard to private corporations; if the articles of association, or the charter, provide a mode of settling disputes about the corporate rights of the members, the courts do not feel inclined to interfere, unless where the corporate remedy is inadequate; and a remedy is not regarded as inadequate, merely because it produces unsatisfactory results, but because it has some inherent inadequacy, or has resulted in some impracticable decision, or has been defeated of its purpose by some fraudulent contrivance; no mere misjudgment, in such cases, is suffi-

(Ouster.)

cient to justify the intervention of the courts, for no human tribunal can be exempt from this, and especially, from the charge of it. Exactly the same is the rule relative to disputes arising in the official organization of public corporations. The constitution does not require any judicial intervention therein, and the legislature may dispense with it; and whenever the corporate law provides a mode of settling disputes therein, without the intervention of the courts, that mode is deemed exclusive of the ordinary remedies, and the judicial authority is dispensed with, because adequately supplied. The two political parties in Philadelphia were in dispute before us twice, on this point, during the first year and the year before, in Hulseman's case (41 Penn. St. R. 396), and the sheriff's case (43 Ibid. 384), and both times we decided this principle as we now decide it; we cannot surrender it.

In none of these classes of cases, does this rule leave the parties without a remedy; but it refers them very decidedly to the remedy, public or private, which has been specially provided; and it is usually, after this remedy has disappointed their wishes, that they complain of the want of an adequate remedy. Their meaning, then, ordinarily is, that the special remedy has produced an unfavorable or displeasing result, and that there ought to be a remedy for *that*; an argument that would allow no human tribunal to render a final decision in any cause. And perhaps this rule ought to be regarded as much less subject to equitable exceptions, in its application to public, than in its application to private causes; because measures of social organization are not necessarily subject to judicial cognisance, whilst questions of private right are. Yet we are far from saying, that there can be no case in which the courts would be justified in interfering with the administration of such special remedies, even in public cases.

Here, it is clear, that the remedy for the case of a disqualified member, is given to the council; it must judge and determine the question, and remove or not, according

(Ouster.)

to its decision. That remedy sets aside the judicial authority, in such cases, except where it is retained by equitable considerations. We discover no such equitable reasons here; we do not even discover that there was any clear misjudgment. The supreme court seems to have had much hesitation in saying, that the designation of Mr. Binns's newspaper, for the publication of the United States laws, was not an appointment of him to an office (17 S. & R. 219); and probably they would have hesitated much more to say so, in such a case as this, where the person appears in the government Blue Book, as an officer of trust, salary and authority. But the case does not need this consideration; no sort of equity is pretended to be shown, in order to justify a departure from the remedy specially given by the law; no equitable remedy is sought; our case is one of pure law, in the form of a *mandamus*, and pure law rejects that as a remedy for the case. The point taken in the return is sustained, and the demurrer of the plaintiff is overruled.

Judgment for defendants.

---

That the acceptance of a disqualifying office, after the member has taken his seat, operates as a forfeiture of it, has been repeatedly decided by congress, in the case of members of the house of representatives. Van Ness's Case, 1 Cong. Elect. Cas. 122; Zell's Case, 2 Ibid. 92; Byington v. Vandever, Ibid. 395; Stanton v. Lane, Ibid. 637.

## COMMONWEALTH v. GARRIGUES.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1857.

(REPORTED 28 PENNSYLVANIA STATE REPORTS 9.)

[*Quo warranto.*]

Where a statute prescribes a mode for inquiring into, and determining the regularity and legality of a municipal election, and provides that the decision of the tribunal shall be final, such jurisdiction is exclusive, and a writ of *quo warranto* will not lie.

This was a writ of *quo warranto* issued upon the suggestion of the attorney-general against William Garrigues, the defendant, to show by what warrant he claimed to exercise the office of alderman of the Twenty-fourth ward of the city of Philadelphia. The defendant pleaded to the jurisdiction, on the ground that under the act of 1854, the election could only be contested by proceedings for that purpose in the court of common pleas of Philadelphia. To this plea the commonwealth demurred.

*Waite*, for the commonwealth.

*Townsend*, for the defendant.

LEWIS, C. J., delivered the opinion of the court. The act of 2d February 1854, provides that the returns of all municipal elections (with exceptions not material to the present case), "shall be subject to the inquiry and determination of the court of common pleas of the county of Philadelphia, upon the complaint of fifteen or more of the qualified voters of the proper ward or division, which complaint shall be filed in the said court, within twenty days after such election," &c., and "the said court, in judging of such elections, shall proceed upon the merits

(Quo warranto.)

thereof, and *determine finally* concerning the same, according to the laws of the commonwealth." If the election of William Garrigues had been contested in the manner thus prescribed, the judgment of the court of common pleas would have been final; it would not have been reversed by *quo warranto*, nor by any other collateral proceeding; even a *certiorari* would only draw into review in this court the regularity of the proceedings, without reaching the merits of the case, as disclosed in the evidence; on the merits, the judgment of the common pleas, by the terms of the act of 1854, is final and conclusive.

In addition to the provision of the statute to this effect, the principle of the common law produces the same result. It is the interest of the public, that there should be an end of contention; justice to the parties requires, that no one should be twice vexed for the same cause; for these reasons, the general rule of the common law has been established, that no judgment of a court of competent jurisdiction can be re-examined in a collateral proceeding. If the election had been contested in the manner prescribed by the statute, the decree of the common pleas could not have been re-examined in this form of action; can the commonwealth gain any advantage by disregarding the requirements of the statute? The act of 1806 furnishes an answer to this question; the remedy prescribed by the statute must be pursued.

But it is argued, that the commonwealth is not bound by the statute. It is true, that the general rule in England is, that the king is not bound by a statute, if he be not named in it; but this rule has many exceptions. All statutes made to suppress wrong, to take away fraud, to prevent the decay of religion, to prevent tortious usurpations, or to secure to electors the right to make free election, are excepted out of this rule, in England, and bind the king, although he be not named. 5 Co. 146; Dwarries on Stat. 27-8. The act of 1854 comes within the spirit of several of these exceptions. In addition to this, the

(Quo warranto.)

subject-matter, being one in which the commonwealth is a chief party in interest, plainly indicates an intention to bind the state; if this were not the construction, the statute would be almost inoperative. It is, therefore, our opinion, that the remedy prescribed by the act of 1854 excludes all other remedies for matters which might have been investigated in the form prescribed by that act.

It is not necessary to determine how far this statute binds Henry Wynkoop; he is not a party to this suit; he has carefully avoided becoming the relator or in any way making himself liable for costs. The 13th section of the act of 13th April 1840, applies to writs of *quo warranto* brought by individuals, in which the controversy is "between persons claiming to be duly elected." It does not, therefore, apply to this case; if it did, it is repealed by the act of 1854, so far as the former is repugnant to the provisions of the act last mentioned. It follows, that the defendant is entitled to judgment on the demurrer.

Judgment for defendant.



## COMMONWEALTH v. MEESER.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1863.

(REPORTED 44 PENNSYLVANIA STATE REPORTS 341.)

[ *Quo warranto*. ]

A *quo warranto* will lie to test the right of a person to a seat as a member of a municipal legislative body, though it have power to decide upon the election and qualification of its own members, where the claim rests on an election to fill a vacancy which did not exist; the court cannot inquire into the regularity of the election, but it can decide whether there was an office or a vacancy to be filled.

This was an application by Henry E. Wallace and Edmund S. Yard, for a writ of *quo warranto*, to test the right of the defendant to the office of a member of the common council of the city of Philadelphia. The suggestion set forth that the Fifth ward of the said city, having less than 4000 taxable inhabitants, was entitled to but one member of common council; that William M. Baird was elected to said office in 1861 for the term of two years, and that his term of office had not expired; that at the election in 1862, five votes were cast for the defendant, in virtue of which the return judges had fraudulently given him a certificate of election, and that on such certificate he had been admitted to a seat in the common council by the officers thereof.

LOWRIE, C. J., delivered the opinion of the court. It would be a vicious rule of law that would allow all public officers to be annoyed by a *quo warranto*, at the pleasure of every intermeddler or malicious person, and therefore, we have hesitated in granting this writ at the suit of a private person; but it is quite apparent, that the relators here really represent a large and respectable political party,

(Quo warranto.)

and are not induced to act by mere personal motives. And we observe that by the act of 24th April 1854, § 3 (not cited to us in arguing these disputes, and not before noticed by us), any tax-payer may obtain an injunction against any violation of the charter-law of the city, and we may take this as a fair analogy for granting this writ, especially, as we can always prevent the abuse of it, by the exercise of the discretion that belongs to all prerogative writs. Yet, it is not without some hesitation, that we pass this objection, and come to the essential question of the cause.

Is there a reasonable cause shown for disputing the defendant's title to the office of common councilman? We think there is: it is denied that there was any vacancy to be filled for the Fifth ward, at the time of the last election, and this appears to be well founded; for it does not appear that the ward had 4000 taxable inhabitants on the list of taxables of the preceding year, and the sheriff issued no proclamation for an election for the office, and therefore, the people did not understand that there was to be an election for it, and only five of them, out of nearly 4000 taxables, voted. This ward has already one member, and is not entitled to another, unless it had 4000 taxable inhabitants. Here, then, are the regular steps to a valid election; an official list of taxables of the preceding year, showing 4000 taxable inhabitants; a proclamation of the sheriff of a vacancy to be filled, which proclamation is expressly required; and an actual election, in pursuance thereof, conducted by the proper officers and certified as the law directs; if any of these steps be wanting, then the election was irregular, and the defendant's title to the office was, at least, doubtful. But let us be careful here; this court has no authority to judge whether the election was regularly conducted or not, for that duty is assigned by law to the councils; our duty must be confined to the decision of the question, whether there was an office or vacancy to be filled.

(Quo warranto.)

Was there a vacancy in the representation of the Fifth ward, that could be lawfully voted for at that election? was there the competent number of taxable inhabitants? The relator relies on the record to show that there was not, and the defendant appeals to oral evidence that there was; one sticks to the letter and form of the proceeding, and the other appeals to the spirit and substance of it. How shall we dispose of this appeal? No doubt there are very many cases, in which a strict adherence to the letter of the law would be destructive of justice, and it is quite impossible for the law to define, with precision, all the customary rights of a people, or to express exactly the duties arising from the ever-changing forms of social transactions; there is a very large field of social relations, wherein the law, whether statutory or customary, must ever remain somewhat indefinite, in order to be adapted to society. But is it so with our election laws? We think not: all our electoral rights depend on written law, and it only can define them. It is true, that written law depends itself on ulterior principles of natural law; but those principles are subject to very great diversities of application, and lack entirely that definiteness which is an essential quality of law as a rule of common or social conduct; law is intended to be a definition of those principles, in such a form as to fit them for a ready and ordinary use, and to avoid the disputes that necessarily grow out of more general principles. And nowhere is clear and precise definition more needed, than in the laws that relate to the organization of society, and to the maintenance of its organic forms; form is the sole purpose of them, and we must view them formally, and follow them strictly, else the whole society is very apt to be disturbed. No latitude or looseness of administration of the law is tolerable, when it endangers the peace and order of society; it ought to be so steady, as not to be at all shaken by partisan excitements.

The defendant thinks that his ward is entitled to two

(Quo warranto.)

members of council, if it has, in fact, 4000 taxable inhabitants. But this is not the law; it is, that it is so entitled, only in case it has so many, "according to the list of taxable inhabitants for the preceding year;" their representation is, therefore, not according to taxables, but according to the inhabitants actually taxed, and placed on a particular list, as taxed; all taxables *ought* to be on that list; but the right depends not on this, but on the fact that they *are* so. What is the list of taxables? Under the charter act of 1854, and no doubt, long before, this was no other than what is usually called the assessment-book; but in the supplement of 13th May 1856, § 6, this is changed in a way that may cause some uncertainty, unless care be taken; it requires the assessors to make out, of course, from the assessment-book, "an alphabetical list of all the taxables, to be returned to the commissioners with the assessment-book, to be used for election purposes." This, then, is the list by which the representative number is to be ascertained, and we must take it as we find it returned into the commissioners' office by the joint act of the assessors, and by it the sheriff must be guided in proclaiming the number of common councilmen to be elected in each ward; for election purposes, it is a record. Many names in the tax-list of the ward of the year 1861, are erased, by red lines drawn through them, and they must, for the fixing of the representative number, stand as now written there; only what are left appear to be the joint act of the assessors. If any one has fraudulently erased them, let him be punished for it, by refusing him all compensation, or by other penalty. The erasure rather seems to have been properly done; and it is admitted, that the unerased names do not amount to 4000. Without speaking, therefore, of the want of the sheriff's proclamation, or of any real election by the people, we think the relators have shown good cause for the writ.

Quo warranto awarded.

(Quo warranto.)

The doctrine of *Commonwealth v. Garrigues*, that where a statute prescribes a mode for determining a contested election, a *quo warranto* will not lie, was followed in Pennsylvania, in *Commonwealth v. Baxter*, 35 Penn. St. R. 263; *Commonwealth v. Leech*, 44 Ibid. 332; *Commonwealth v. Loughlin*, 20 Leg. Int. 100 (ante 651); *Commonwealth v. Barger*, Ibid. 101; and *Commonwealth v. Reed*, 18 Pittsburgh Leg. Journal 131. And in Ohio, in *State v. Marlow*, 15 Ohio St. R. 114; and *Peck v. Weddell*, 17 Ohio St. R. 271. (And see *Hulseman v. Rems*, 41 Penn. St. R. 396, ante 314.)

But these decisions are directly in conflict with the earlier judgment of the supreme court of Pennsylvania, in *Commonwealth v. McCloskey*, 2 Rawle 369 (ante 196), the doctrine of which was followed by the supreme court of California, in *People v. Holden*, 28 Cal. 123 (ante 480). In this latter case, Chief Justice Sanderson said: "It is first claimed by the appellant, that the district court had no jurisdiction in the premises, and that the only remedy, in cases like the present, is under the statute which prescribes the mode and manner of contesting elections. No proposition could be more untenable. It is true, that the act providing the mode of contesting elections, confers upon any elector of the proper county, the right to contest, at his option, the election of any person who has been declared duly elected to a public office to be exercised in and for such county. But this grant of power to the elector, can in no way impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom, if it be made to appear that he is a usurper, having no legal title thereto. The two remedies are distinct; the one belonging to the elector, in his individual capacity, as a power granted, and the other to the people, in the right of their sovereignty. Title to office comes from the will of the people, as expressed through the ballot-box, and they have a prerogative right to enforce their will, when it has been so expressed, by excluding usurpers and putting in power such as have been chosen by themselves; to that end, they have authorized an action to be brought in the name of the attorney-general, either upon his own suggestion or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. It matters not, upon what number of individuals, a right analogous in its results, when exercised, may

(Quo warranto.)

have been bestowed, for the power in question, none the less, remains in the people, in their sovereign capacity; it has been shared with the elector, but not parted with altogether."

So, in *Armstrong v. Miller*, where the select council of Philadelphia had refused to receive the report of an election committee, vacating the seat of the defendant, Mr. Justice Strong, in the court of *nisi prius*, refused to interfere, on a bill for an injunction, mainly on the ground that the law gave a full remedy by writ of *quo warranto*. 2 January 1864.

Where the office is a public one, a *quo warranto* will not lie at the suggestion of a private relator. *Commonwealth v. Burrell*, 7 Penn. St. R. 34; *Commonwealth v. Cluley*, 56 Ibid. 270 (ante 144); *State v. Boal*, 46 Mo. 531. And even where the law permits such action, a mere stranger cannot interfere; the relator must, in such case, show his own right to the office to be superior to that of the defendant. *State v. Adams*, 2 Stew. 235-6 (ante 289); *People v. Lacoste*, 37 N. Y. 192. Thus, an information in the nature of a *quo warranto* to determine the right to an office as between rival claimants, must set forth all the facts which show that the relator is entitled to it; it is not enough, to show that the incumbent is disqualified. *State v. Boal*, 46 Mo. 528. In Pennsylvania, the purview of the act of 13th April 1840, is broad enough to cover all questions arising on writs of *quo warranto*, between rival claimants of elective offices. *Commonwealth v. Cullen*, 13 Penn. St. R. 133. It is, however, a rule of corporation law, that a person shall not be permitted to impeach a title conferred by an election in which he concurred; but if a person do not know, or have the means of knowing of an objection to an election, at the time it takes place, he will not be deemed to have concurred in it; and the subsequent recognition of an election does not, necessarily, and under all circumstances, preclude one so acquiescing from questioning its validity as a relator in a *quo warranto*; for before one can be charged with acquiescence in, or recognition of, an illegal election, it must appear that he had knowledge, or the means of knowledge, at the time of such recognition. *Commonwealth v. McCutchen*, 2 Pars. 205.

## LEWIS'S CASE.

In the Supreme Court of Pennsylvania.

NOVEMBER TERM 1857.

(REPORTED 29 PENNSYLVANIA STATE REPORTS 518.)

[*Term of office.*]

The commissions of the judges of the supreme court are to be computed from the first Monday of December next succeeding their election, to the first Monday of December in the year of their limitation.

WOODWARD, J., delivered the opinion of the court. In order that writs out of this court may be tested in the name of the proper officer, and that judgments and decrees may be duly entered, between the 1st and 7th days of December, proximo, it becomes necessary to decide, whether the commission of Chief Justice Lewis will expire on the first day of that month, or continue until the 7th, which will be the first Monday. If we should follow the strict letter of the constitutional amendment of 1850, which first introduced an elective judiciary into our system of government, it would be obvious, that Judge Lewis's commission could not extend beyond the first of December, because, elected in 1851, at the first election under the amendment, and the term of six years assigned to him by the lot therein prescribed, he was commissioned on the first Monday, which happened, that year, to be the 1st day of December 1851, for six years, a period that would expire at midnight of the last day of November 1857. He received subsequently a commission as chief justice, which, however, was founded on that granted in 1851, and in no wise superseded it, or affected the limitation therein expressed. The title to his office was derived, not from the commission which designated him as chief justice, but from the popular election of 1851 and the commission in

(Term of office.)

pursuance thereof; and according to these, upon a literal reading of the constitution, his title would expire with the present month of November.

But we are satisfied, that the spirit and true meaning of the amendment are rather to be followed, than its strict letter; and according to these, the first Monday of December is made the *terminus a quo* and *ad quem* of judicial commissions; so that, whether we reckon the special tenures assigned to the first five judges elected to this court, or the general tenure of fifteen years assigned to all subsequently-elected judges, they are to be considered as running from the first Monday of December next succeeding the election, to the first Monday of December in the year of their limitation; in other words, we hold, that the years mentioned in the amendment are to be counted from Monday to Monday, and not from the day of the month to the day of the month. The amendment itself implies that this is a sound construction. It fixed, expressly, the first Monday of December 1851, as the day on which all prior judicial commissions should expire, and of course, indicated that as the day on which the new ones should commence; and it was the first Monday, without regard to the day of the month on which that day of the week should fall. That year, the first Monday happened to be the first day, but that day was selected, not because it was the first day, but because it was the first Monday of December; the framers of the amendment very well knew, that the first Monday would not always fall on the first day. And so, in the case of a vacancy, it shall be filled, says the amendment, by executive appointment, "to continue till the first Monday of December succeeding the next general election." Our brother Armstrong is on the bench by executive appointment, under this clause of the constitution, and his commission, by its own limitation, must extend to the first Monday, this year, the seventh day of December. It is unreasonable to suppose, that the amendment, which was designed to establish an elective judiciary, meant to make



(Term of office.)

a distinction in favor of an executive appointment, and against a popular election, and we should mar the symmetry of the system by so administering it. If both classes of judges, however, those elected for a term of years, and those appointed to fill vacancies, are confined to the same rule, if both hold to the first Monday of December, we have a system that is simple, consistent and harmonious in all its parts.

This constitutional amendment originated in and was drafted by the legislature; a legislative interpretation of the meaning of its terms is, therefore, entitled to peculiar respect. We have a legislative construction of it, in the 11th section of the act of assembly of 15th April 1851, regulating the election of judges, wherein it is provided, that as soon as practicable after the first Tuesday in November next following any election of judges, "the governor shall grant the persons elected, respectively, commissions as are now required by law, to hold their respective offices, from and after the first Monday of December next following such election, for and during their respective terms of office," &c. The constitutional amendment having failed to fix, in terms, the date at which the commissions of elective judges should take effect, the legislature supplied it in this section, and supplied it, of course, according to their understanding of the meaning of the constitution.

The gentlemen recently elected, Messrs. Strong and Thompson, will be commissioned under this section, and cannot, of course, come upon the bench before the 7th of December. If Judge Lewis should go out on the first, there would be a vacancy in the office for a week, and vacancies, says the constitutional amendment, happening from whatever cause, are to be filled by executive appointment, to continue till the first Monday of December succeeding the *next* general election. It is not to be supposed, that the governor would exercise his power of filling this vacancy, but if the constitution be construed according to its letter, the power of appointment would clearly

(Term of office.)

exist; and if exercised, the appointee of the governor would be in possession of the office, by virtue of a *constitutional grant*, whilst the newly-elected judges would claim it only in virtue of a *legislative regulation*. The inferior law would, of course, have to yield to the superior, and one of the elected judges would have to stand back, for a year; but which of them? the constitution and laws afford no means of determining; elected at the same time, and for the same term, and to retire necessarily at the same time, a difference of a year would exist in their tenures, and no man could tell which was the short one.

The constitution was never meant to produce results so absurd and unjust. It provides that the supreme court shall consist of five judges,\* and it established the court as a perpetual institution; it contemplated the possibility of vacancies and provided for filling them, but they were vacancies happening from death, resignation or other cause *external to the constitution itself*. In its own legitimate and necessary operation, it would cause no vacancies; it would dismiss no one of its servants, until it had provided a qualified successor; it would not constitute the court, even for a week, with less than five judges, nor give the governor power to displace for a year the judge chosen by the people. To give our fundamental law its intended effect, and to prevent confusion and disorder, Chief Justice Lewis's commission must be regarded as extending to the first Monday of December.

If it be said, that this is adding a week, by judicial construction, to his prescribed term, it must be accepted as a necessary consequence; and if, fifteen years hence, the first Monday shall fall on the first day of December, the terms of Messrs. Strong and Thompson will be abbreviated a week, but that too must be borne as a necessary result of the indefinite terms in which the constitutional amend-

\* It provides no such thing; the supreme court at the time of the adoption of the amendment, consisted of five judges, and the amendment provided for the tenure of the first five judges to be elected, which was to be determined by lot.

(Term of office.)

ment was conceived. It is a common fault of our legislation (and the amendment of 1850 shares it largely), that phraseology is not carefully considered. In the amendments of 1838, nothing was more anxiously attended to than the language in which comprehensive rules were to be expressed,\* and the consequence has been, that less doubt and litigation have grown out of those numerous amendments, than have sprung from the single amendment of 1850. Reading it, however, as we have construed it, in respect to the termination of judicial commissions, we avoid vexatious embarrassments, and give effect to its spirit and intention; and as to the week added to one judicial tenure and taken off from another, the maxim must be applied, *de minimis non curat lex*. The prothonotaries of the several districts will test writs in the name of Chief Justice Lewis until the 7th December 1857.

---

In 1865, a question arose in Philadelphia as to the election of controllers of the public schools; the act of 22d March 1865 had provided that the directors, at a meeting held on the third Tuesday of December, should elect one of their number to serve as controller for one year, from the first Monday of January next ensuing, and the question was, whether this election was to be held by the directors then in office, some of whose terms would expire on the 1st January, and whose successors had already been elected, or by the directors holding over and the persons elected as directors, who would hold office for the year during which the controller was to serve. LUDLOW, J., admitting that the statute was clothed in very ambiguous language, came to the conclusion, that the board as then organized were the electors of the controllers of the ensuing year. *Case of the School Controllers*, 6 Phila. 110. A like action by a retiring body was held binding in *Hadley v. City of Albany*, 33 N. Y. 603 (ante 307).

In Missouri, a person elected, at a special election, to fill the office of judge of the St. Louis county court, was adjudged to hold only until the next regular general election. *State v. Conrades*, 45 Mo. 45.

---

\* The learned judge was a distinguished member of the constitutional convention of 1837-8.

## COMMONWEALTH v. HANLEY.

In the Supreme Court of Pennsylvania.

JANUARY TERM 1848.

(REPORTED 9 PENNSYLVANIA STATE REPORTS 513.)

[ *Vacancy in office.* ]

Where an officer holds for a term of years, and until his successor is duly qualified, the death of the person elected to fill the office, before he has qualified himself according to law, does not create a vacancy that can be filled by executive appointment.

This was a *quo warranto* to inquire by what authority the defendant claimed to exercise the office of clerk of the orphans' court for the county of Philadelphia. It appeared by the pleadings, that the defendant had been elected, at the general election in 1845, and commissioned for the term of three years from the first of December 1845, and until his successor should be duly qualified; that at the general election in 1848, one Oliver Brooks had been duly elected as the defendant's successor in office, but had died on the 5th November following, before he had been commissioned or qualified. The governor deeming that this created a vacancy, to be filled by executive appointment, thereupon, commissioned Broom, the relator, to fill the supposed vacancy.

*Reed*, for the relator.

*J. & C. Fallon*, for the defendant.

ROGERS, J., delivered the opinion of the court. The rights of the relator and respondent depend upon the construction of that part of the amended constitution which provides "that prothonotaries of the supreme court shall be ap-

(Vacancy in office.)

pointed by the court, for the term of three years, if they so long behave themselves well; prothonotaries and clerks of the several other courts, recorders of deeds and registers of wills, shall, at the time and place of election of representatives, be elected by the qualified electors of each county or district over which the said courts extend, and shall be commissioned by the governor; they shall hold their offices for three years, if they shall so long behave themselves well, *and until their successors shall be duly qualified*; vacancies in any of the said offices shall be filled by appointments, to be made by the governor, to continue until the next general election, and until their successors shall be elected and qualified as aforesaid." The cardinal rule in the construction of the constitution is, the spirit and intention of its framers; and this intention we have endeavored to carry out in *Commonwealth v. Swift*, 4 Whart. 186, in *Commonwealth v. Collins*, 8 Watts 344, and in other cases.

The respondent was elected clerk of the orphans' court for this city and county, the second Tuesday of October 1845, and being so elected, the then governor of the commonwealth issued a commission to him, in due form, dated the 9th November 1845, whereby the respondent was commissioned, in the language of the constitution, to be clerk of the orphans' court for the term of three years, to be computed from the first day of December 1845, *and until a successor shall be duly qualified*. The respondent took the oath of office, gave bond, with sureties, as required by law, was in all respects duly qualified, entered on the duties of his office the 1st December 1845, behaved himself well, and has since used and continued to use and execute the same. The second Tuesday of October 1848, Oliver Brooks was elected successor to the same office, but having died the 7th November 1848, within thirty days (the time prescribed by the act of 2d July 1839) from the day of election, he never was, nor could be, qualified to fill the office, by taking the necessary oath or by giving bond as

(Vacancy in office.)

the law requires. In this position, the governor, reciting that a vacancy had occurred in the office, issued his commission to the relator.

The relator contends that, according to the spirit of the constitution, the tenure of county officers is strictly limited as to time, viz: three years; that any extension of the time arises only from the exigency of the case, and must be strictly construed; that the holding over of the incumbent is confined to the single instance of failure to qualify (a failure resulting from the act or omission of the successor); that there can be no holding over, when a vacancy occurs which is to be filled, for a limited time, by executive appointment; that, if neither the death of the successor, before his commission takes effect, nor the expiration of the term of three years for which the respondent was elected and commissioned, create a vacancy, the incumbent necessarily holds over for three years, and a popular election next year is defeated; that the office, so far as to create a vacancy by death, is filled by election, and that, at the expiration of the term of three years for which an incumbent is elected and commissioned, a vacancy occurs, even though there be no election by the people, as, in case of a tie; such incumbent continues under a provisional tenure, being only a temporary officer, until his successor shall be duly qualified. The respondent denies and avoids the several propositions of the relator, and insists, that sedulous care is taken, in the amended constitution, to restrict, as far as possible, the patronage of the executive, and to give him the power of appointing to the office in question *only* when the public necessity requires it; that the governor has the right of appointment in the single case, where a vacancy has occurred, and then only, because public convenience demands that there should be some actual incumbent competent to fulfil the duties of the office.

The fundamental error which lies at the root of the whole case of the relator, consists in the assumption that,

(Vacancy in office.)

according to the spirit of the constitution, the tenure of county officers is strictly limited as to time, viz: three years; and that any extension of the time arises only from the exigency of the case, and must be strictly construed. The relator assumes that the respondent was elected and commissioned only for three years; but this is a mistaken view of the constitution, and is only plausible, by obliterating several important words from that instrument. The constitution reads thus: "they shall hold their offices for three years, if they shall so long behave themselves well, *and until their successors shall be duly qualified.*" The obvious meaning of this clause is, that they cannot hold office for less than three years, if they so long behave themselves well; although, on the happening of certain contingencies, they *may* hold office for a longer period. It is, therefore, of no consequence that, according to the respondent's construction, he holds office for six, instead of three years. Without intimating an opinion as to the term of his office, or that, if, as the relator contends, it would be a great misfortune, we think there is nothing in the argument which can overrule the plain words of the constitution. That question does not directly, although it may incidentally arise, and may be, and has been, considered by the court, and due weight attached to it, without, however, altering the conclusion to which we have felt ourselves bound to come. Besides, it will be for the legislature to determine, whether this result, so much deprecated by the relator, may not be removed by legislative enactment.

That the respondent is entitled to hold until his successor is duly qualified, are the words of the constitution. Was a successor duly qualified within its spirit? is the point, on which the question mainly, if not entirely depends. Being duly qualified, in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that he, the successor, shall possess every qualification; that he shall, in all respects, comply with every requisite, before entering on the duties of his office;

(Vacancy in office.)

that, in addition to being elected by the qualified electors, he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation (see 8th article of the constitution) to support the constitution of the commonwealth, and to perform the duties of the office with fidelity. Until *all* these prerequisites are complied with by his successor (if you can dispense with one, you can dispense with all), the respondent is *de jure*, as well as *de facto*, the clerk of the orphans' court. The words are emphatic and full of meaning; the successor must not only be qualified, but *duly qualified*; and qualification for office, as defined by the most approved lexicographer, is, endowment or accomplishment that fits for an office; having the legal requisites; endowed with qualities fit or suitable for the purpose. In this sense it is used in the same section of the constitution (Art. VI., sect. 3), as respects electors; "qualified electors" clearly meaning citizens, either native or naturalized, who have paid taxes, and who are, in all respects, entitled to vote. In the same connection it is used in other parts of the constitution, and in various acts of assembly, which it would be a work of supererogation particularly to enumerate. Even in its direct, restricted, popular sense, it means he shall have taken an oath or affirmation.

The constitution provides, not only that the officer shall be elected, but that he shall be commissioned by the governor; this is conclusive proof, that the election alone does not constitute him an officer, in a constitutional sense; for there may be cases, where the governor would be bound, by an imperious sense of duty, to withhold the commission from a person duly elected by the qualified electors, as, for example, in case of insanity developed since the election, or the conviction of some high crime or misdemeanor; where this occurs (and it is possible, though not probable), no person will venture to contend, that the office is filled by election, as the relator contends, so as to create a vacancy by death. It is said, and this is the



(Vacancy in office.)

strength of the relator's case, that the holding over of the incumbent is confined to the single instance of failure to qualify, a failure resulting from the act or omission of the successor. But, for this distinction, we see no warrant in the constitution, or in the reason of the thing; for, of what consequence is it, in principle, whether the officer elect is prevented from qualifying himself by an inability or unwillingness to give the necessary security, by neglect or refusal to take the required oath or affirmation, by insanity or crime, or by the contingency of death? It is enough for the incumbent, who holds the office by a constitutional tenure, that, for some cause, with which he has nothing to do, the requirements of the constitution and laws have not been complied with. The only inquiry is, has a successor been duly qualified? if he has not, we are not at liberty to inquire whether it has arisen from his own act or omission, or has been caused by death, or by other causes over which the successor may have had no control. The 10th October 1848, Brooks was elected to be the respondent's successor, and never could be qualified, for he died the 7th November 1848, within thirty days from the day of his election, and before his commission could be legally issued.

Did the case rest here, the title of the respondent would be clear and unquestionable; but the relator contends, that the facts presented a case of vacancy, which the governor had the right to fill, and this brings us to the consideration of that question. Vacancies of the offices enumerated in the preceding part of this section (so reads the constitution) shall be filled by appointments to be made by the governor, to continue until the next general election and until successors shall be elected and qualified as aforesaid. To sustain the proposition, that in this case, the governor has the right of appointment, as a case of vacancy, it is necessary for the commonwealth to establish, that the office, so far as to create a vacancy by death, is filled by election. On this point, several remarks have already

(Vacancy in office.)

been made pertinent to the question, which it would be useless to repeat. That the framers of the constitution did not look to an election merely, as conferring office, is very evident, because, otherwise, we must strike out the important words, that before a person who has been regularly elected, commissioned, given bond and sworn, can be suspended, his successor must be qualified in like manner. That there is a difference between the election and qualification of an officer, is too apparent to need the aid of argument. The successor must not only be elected, but he must be qualified, are the words of the constitution, showing, beyond all question, that the election and qualification do not mean one and the same thing.

It will be observed, that the terms, on which alone the governor can appoint, are a *vacancy in the office*; and that there can be a vacancy in an office when there is a person in possession, whom all acknowledge to be rightfully in possession, having a perfect right to exercise all the powers and duties of the office, and to receive and enjoy all its emoluments, is a position difficult to comprehend. It is an abuse of terms, to say, that at the time the governor issued his commission to the relator, the office was vacant, for no person can plausibly deny that the respondent was the rightful possessor of the office, at that time. The primary object of the framers of the amended constitution (whether wisely or not, it would be unbecoming in me to say), was, to diminish, as far as practicable, executive patronage; and in accordance with this policy, it was thought proper, to confine the power of appointment to the single case of a vacancy in office. What, then, is meant by a *vacancy in the office*? Surely, an office cannot be vacant, when it is filled by a person in the legitimate exercise of all its functions, in the lawful enjoyment of all its emoluments.

It would be a waste of time, to enter into an elaborate argument to prove a proposition so plain. But disguise it as you may, this is the case here; at the time the go-

(Vacancy in office.)

vernor issued his commission to the relator, the present incumbent, beyond all controversy, was the legal officer of the court, his time had not expired, nor could he be replaced except by a person fulfilling all the constitutional and legal requirements. The relator's proposition involves the legal absurdity, that two persons can be the lawful officer of the same office, at one and the same time. In this case, we have to choose between the elect of the people and the appointee of the governor, and we think we cannot assail the intention of the constitution, by inclining to the former rather than to the latter; the respondent was elected by the people, and we see nothing by which his title to the office has been affected or impaired.

Judgment for defendant.

---

In Pennsylvania, if a vacancy occur in the office of judge, within three months of the general election, it is not competent for the electors to fill the same at that election; the appointee of the governor, however, only holds until the first Monday of December in the same year, when another vacancy in the office occurs, which may be again filled by executive appointment. *Commonwealth v. Maxwell*, 27 Penn. St. R. 444. And the law is the same in Kansas. *State v. Cobb*, 2 Kansas 32. If an office be, in fact, full, though by an irregular election, which has not been contested, the electors cannot treat it as vacant, and proceed to fill it by a new election. *Commonwealth v. Baxter*, 35 Penn. St. R. 263.

In Missouri, the courts have decided, in accordance with *Commonwealth v. Hanley*, that an officer who holds for a limited term and until his successor is duly elected and qualified, can only be displaced by one elected by the people, at an election held at the proper time. *State v. Jenkins*, 43 Mo. 261; and see *State v. Robinson*, 1 Kansas 17; *State v. Benedict*, 15 Minn. 199. In California, in case of a vacancy in the office of judge by the resignation of the incumbent, the governor's appointee only holds until the qualification of the person duly elected by the people. *People v. Rosborough*, 14 Cal. 180. See *State v. Taylor*, 15 Ohio St. R. 137.

There can be no appointment to fill a vacancy, until the office has once been full. *Ex parte Dodd*, 6 Eng. 152. In that case, Johnson, C. J.,

(Vacancy in office.)

said, "we consider it perfectly clear, that the vacancies contemplated necessarily presupposed that the offices had been once filled, and that the provision for filling those vacancies was solely designed to embrace the unexpired portion of the term that might remain after the happening of such vacancy." And see *Johnston v. Wilson*, 2 N. H. 202. This question has been the subject of discussion in the senate of the United States, and the doctrine of *Ex parte Dodd*, is that held by them. In the year 1814, President Madison granted commissions to ministers to negotiate the treaty of Ghent, in the recess of the senate. The principle acted upon in this case, however, was not acquiesced in, but protested against, by the senate, at their succeeding session; and on a subsequent occasion (20th April 1822), during the pendency of the bill for an appropriation to defray the expenses of missions to the South American states, it seemed distinctly understood to be the sense of the senate, that it is only in offices that become vacant during the recess, the president is authorized to exercise the right of appointing to office, and that, in original vacancies, where there has not been an incumbent of the office, such a power, under the constitution, does not attach to the executive. And in a report of a committee of the senate, made on the 25th April 1822, it is declared, that the words, "all vacancies that may happen during the recess of the senate," mean vacancies occurring from death, resignation, promotion or removal. Sergeant Const. Law 373. The same point was decided by Caldwell, J., in the circuit court of the United States for the eastern district of Arkansas, at the April term 1868, in the case of *Schenck v. Peay*; and by the supreme court of Illinois, in *People v. Forquer*, Breese 68. And see Story Const. § 1559; *contra*, *Clarke v. Irwin*, 5 Nevada 112.

## FOSTER v. SCARFF.

In the Supreme Court of Ohio.

DECEMBER TERM 1864.

(REPORTED 15 OHIO STATE REPORTS 532.)

[*Elections to fill vacancies.*]

If the sheriff neglect to give notice to the electors, prior to the day of election, of a vacancy in a particular office, which is to be filled by them, in consequence whereof the great body of the voters have no notice of the vacancy, but a small number of them cast their votes for a single candidate and no votes are cast for any other, such election is irregular and invalid.

Error to the court of Common Pleas of Logan county.  
The facts are stated in the opinion of the court.

*Thurman, Shelby and Kernan*, for the plaintiff in error.

*Stanton and Allison*, for the defendant in error.

BRINKERHOFF, C. J., delivered the opinion of the court. On the second Tuesday of October 1860, Anthony Casad was properly elected probate judge of Logan county, for the full term of three years, and was duly qualified and commissioned; having held the office until the 11th October 1861, less than thirty days prior to the time of the next annual election for that year, he died, leaving a vacancy in the office, which, on the next day, was filled by the governor, by the appointment of Samuel B. Taylor to the office, until a successor should be elected and qualified. On the second Tuesday of October 1862, Taylor was regularly *elected* to the office; but the governor, instead of commissioning him for the unexpired term of Casad, as he ought to have done, commissioned him for the full term of three years; see *State v. Taylor*, 15 Ohio St. R. 137. This was done, doubtless, under a mistaken

(Elections to fill vacancies.)

apprehension of the provisions of the constitution on the subject, and the same mistake seems to have been and to have continued general in the minds of the electors and officials of that county.

Accordingly, in the fall of 1863, when the general election of that year was approaching, at which an election of probate judge, for the full term of three years, to succeed the full term to which Casad had been elected, and then temporarily filled by Taylor, was, by law, required to be holden, the sheriff of the county published, in conformity to law, his proclamation to the electors of the county, for the election, at the ensuing second Tuesday of October, of a governor, lieutenant-governor, judge of the supreme court, auditor of state, treasurer of state, member of the board of public works, senator, member of the house of representatives, county treasurer, surveyor, infirmary directors and county commissioner, but he omitted to make any mention therein of the election of a county judge. Antagonistic nominations of candidates for all the offices named in the sheriff's proclamation, were openly made and published, in good time before the election, by the different parties, but none was made or published for the office of probate judge; and the great mass of the electors of the county, of every grade of intelligence, remained in actual ignorance of the fact, that the office was being balloted for, and that a probate judge ought, under the law, to be chosen at that election, until about three o'clock in the afternoon of the day of election, when it became known in some, perhaps, in most of the townships, that the plaintiff in error, Sidney B. Foster, had been and was being voted for as a candidate for the office of probate judge.

The whole number of votes in the county cast at that election, was 4339; 913 votes, less than one-fourth of the whole number, were cast for the plaintiff in error, for the office of probate judge; and no other votes were cast for that office. In four out of seventeen townships in all, no

(Elections to fill vacancies.)

votes were cast for probate judge; and in one other township, only two votes. Foster was, by the county canvassers, declared to be duly elected; and the defendant in error, William D. Scarff, an elector of the county, having proceeded in the court of common pleas to contest the validity of the election of Foster, according to the statute, that court, upon the state of facts substantially as above given, adjudged the election of Foster to be invalid; and the facts and evidence having been brought upon the record, by bill of exceptions, this petition in error is prosecuted for the reversal of that judgment. The question is, whether the court below erred in holding the election of Foster to be invalid.

The term "election" implies a *choice* by an electoral body, at the time, and *substantially* in the manner and with the safeguards, provided by law, of a qualified person to an office. A vacancy may exist, or may be about to occur, in an office, which vacancy a given electoral body may have the unquestionable right to fill by election; and that electoral body may manifest its choice in a manner which leaves no doubt of the fact of choice, but by means unknown to our laws, as, by a *vivâ voce* vote, or by a vote at times and places not recognised by law; and yet no one would contend for the validity of such an election. The act of choice must be made, the election must be conducted, as prescribed by law, and under the safeguards which the law affords; without the existence of these, at least, in substance, however unmistakable the fact of choice, there is no election in law; the act of election derives all its force and validity from its substantial conformity to the constitution and laws. Now, among the material provisions of our constitution and laws, in respect to elections, and not the least important among them, are the safeguards which they prescribe, by means of notice, against surprise upon the electoral body.

The importance of this safeguard is distinctly recognised in the constitution, where, in the 13th section of the 4th

(Elections to fill vacancies.)

article, it is provided, that "in case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected, for the unexpired term, *at the first annual election that occurs more than thirty days after the vacancy shall have happened.*" From this, the implication is manifest, that the constitution intends that, in respect to elections to fill vacancies in the office of judge, at least thirty days' time for notice of the election shall be afforded. And the 4th section of the act of 3d May 1852, "to regulate the election of state and county officers" (3 Curwen's Stat. 1920), provides, that it shall be the duty of the sheriff, and he is hereby required, fifteen days, at least, before the holding of any special election, to give public notice, by proclamation, throughout his county, of the time of holding such elections, and the number of officers, at that time, to be chosen; one copy of which shall be posted up at each of the places where the elections are appointed to be holden, and inserted in one newspaper published in the county, if any be published therein."

If this legislation, intended to guard the elector against surprise, be complied with, every elector finds posted up, at his place of voting, an enumeration of the offices to be voted for, and is forewarned by public proclamation in the newspapers. If it be not complied with, the case before us shows, that the great body of the electors of a county may go to the polls, vote and return to their homes, in ignorance of existing or impending vacancies in office to be filled. But it is said. the law presumes that every man knows the law, or is bound by it, whether he actually knows it or not, and one man is not to be deprived of his rights, through his neighbor's ignorance of the law. No one denies these general principles; but they, like other general legal principles, are not *procrustean* in their application. The constitution and the legislation under it recognise



(Elections to fill vacancies.)

the policy of notice to electors, other than that which arises from mere legal presumption; and the right of no man is hereby invaded, for no man has a right to filch an office through the medium of a surprise upon the great body of the electors.\* Moreover, a knowledge of what vacancies in office exist or impend, is not a matter of law merely; it is quite as much a matter of local history as of law; and the statute supposes that, with this history, the body of electors cannot be expected to be, at all times, familiar; and in the case before us, the circumstances show, that the mistake, out of which the whole matter originated, involved the governor of the state as well as the electors of Logan county, and does no discredit to their character for intelligence; and the sheriff's proclamation, by embracing many other offices, but omitting that of probate judge, was calculated to mislead instead of enlightening them.

Here, then, was an election held without notice to the body of the electors of Logan county, without notice such as the laws prescribe, and without notice in fact from any other source whatsoever; and for this reason, and irrespective of any circumstances of concealment and stratagem, on the part of the few electors who did vote,† which appear in the record, we are of opinion, that the election, as to probate judge, was irregular and invalid.

In deciding this case, however, we do not intend to go beyond the case before us, as presented by its own peculiar facts. We do not intend to hold, nor are we of opinion, that the notice by proclamation, as prescribed by law, is *per se*, and in all supposable cases, necessary to the validity of an election; if such were the law, it would always be in the power of a ministerial officer, by his misfeasance, to prevent a legal election. We have no doubt that, where

\* To appreciate the value of this argument, the reader ought to understand whether Foster was in political accord with the court. Upon this question the author is uninformed.

† 913 votes were cast for Foster.

(Elections to fill vacancies.)

an election is held, in other respects as prescribed by law, and *notice in fact* of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid. But where, as in this case, there was no notice, either by official proclamation, or in fact, and it is obvious, that the great body of the electors was misled, for want of the official proclamation, its absence becomes such an irregularity as to prevent an actual choice by the electors, prevents an actual election, in the primary sense of that word, and renders invalid any semblance of an election which may have been attempted by a few, and which must operate, if it be allowed to operate at all, as a surprise and fraud upon the rights of the many.

Judgment affirmed.

---

There is some conflict of decision as to the validity of a special election to fill a vacancy, which is held without notice to the electors. In New York, it has been determined, that where the office of a justice of the supreme court became vacant by the death of the incumbent on the 23d October, when it was too late for the secretary of state to give notice thereof, it was competent for the electors of the district to elect a person to fill the vacancy, at the ensuing election on the 6th November following, and that such election was valid notwithstanding the want of notice. *People v. Cowles*, 13 N. Y. 350. So, in Michigan, it was held, that where a city charter requires a vacancy in a city office to be filled, at the next annual election, and directs the clerk to give notice thereof, and of the offices to be filled, and the notice makes no mention of an existing vacancy, the default of the clerk will not invalidate the election; the electors are presumed to have notice of the vacancy from the publication of the proceedings of the city council. *People v. Hartwell*, 12 Mich. 508. The same point has been ruled in Wisconsin; *State v. Orvis*, 20 Wis. 235; *State v. Goetze*, 22 Ibid. 363: and in Iowa; *Dishon v. Smith*, 10 Iowa 218. In Indiana, it was decided, that an election for county auditor was not void by reason of want of notice. *State v. Jones*, 19 Ind. 356. But in the same state, it was held, that an election to fill a

(Election of judges.)

vacancy cannot be held, where it did not occur long enough before the election, to enable the proper notice to be given. *Beal v. Ray*, 17 Ind. 554. And in California, it is said that the governor's proclamation is essential to the validity of a special election to fill a vacancy. *People v. Porter*, 6 Cal. 26; *People v. Weller*, 11 Ibid. 49; *People v. Martin*, 12 Ibid. 409; *People v. Rosborough*, 14 Ibid. 180.

---

## COMMONWEALTH v. CONYNGHAM.

In the Supreme Court of Pennsylvania.

OCTOBER TERM 1870.

(REPORTED 3 BREWSTER 214.)

[*Election of judges.*]

The constitution having provided that judges shall be elective by the people, it is not in the power of the legislature to create a new court, within part of the territorial jurisdiction of an old one, and to provide that the judge of the old court shall hold the new one; the judge of the new court must be chosen by the people of his district.

This was a *quo warranto* issued, on the suggestion of the attorney-general, against John N. Conyngham, to inquire by what right he claimed to exercise the office of recorder of the mayor's court of the city of Scranton.

By the act of 23d April 1866, incorporating the city of Scranton, there was created a mayor's court for the said city, and it was provided that the president judge of the eleventh judicial district should be recorder of the said city, and should be the president judge of the said mayor's court. The respondent was elected president judge of the eleventh judicial district at the general election in 1851, and was duly commissioned; and by virtue of the said act he claimed to exercise the office of recorder of the said city. To an answer setting forth these facts, the attorney-

(Election of judges.)

general demurred, on the ground that the constitution requires all judges to be elected by the people.

*Brewster*, attorney-general, *Ward* and *Handley*, for the commonwealth.

*Hand* and *Willard*, for the respondent.

THOMPSON, C. J., delivered the opinion of the court. The writ in this case was issued upon the relation of the attorney-general, to test the right of the respondent to exercise the office of recorder of the mayor's court of the city of Scranton, in Luzerne county, under the provisions of an act incorporating said city, passed the 23d of April 1866, and the supplement thereto of the 30th of March 1867. At our sitting in July last, in the eastern district, having heard the arguments in the case previously, we entered judgment on the issue made, in favor of the commonwealth, and consequently, of *ouster* against the respondent, and reserved to the present time the announcement of our reasons for the judgment so entered, some of which we propose now briefly to state.

By the first of the above-mentioned acts, the inhabitants embraced and residing within the territorial limits of the township of Providence, the borough of Scranton, the borough of Hyde Park and the borough of Providence, in the county of Luzerne, are constituted a corporation by the name and style of the City of Scranton, and divided into twelve wards. In addition to the usual powers conferred on such municipal corporations, a mayor's court is established by the act, to be holden quarterly by the mayor, recorder and aldermen, or any three of them, the mayor or recorder being one, "with full power," says the act, "to hold and keep a *court of record* within said city, four times in each year, to continue one week each," and longer, by adjournment, if necessary.

The criminal jurisdiction of this court is, by the act, to

(Election of judges.)

extend to "all such offences, committed or arising within the limits embraced by the city, as are triable in other courts of quarter sessions in the commonwealth," with the power to forfeit and issue process for the recovery of all recognisances forfeited therein, and "generally," says the act, "to do all such matters and things within the said city, as any court of quarter sessions of the peace of and for any county within this commonwealth, may or can do within such county." Thus, there is established, within the city, a court of quarter sessions of general jurisdiction, as fully and clearly as any other court is or can be established within any county of the commonwealth.

In addition to this general criminal jurisdiction, it is provided in the 15th section of the act, as follows: "That the mayor's court for the city of Scranton shall have original civil jurisdiction to the same extent as is conferred by law upon the court of common pleas of Luzerne county, in all cases where the defendant shall reside within the limits of said city, and also of all amicable actions where the parties shall, by writing, institute the same in said county; and the remedies, processes, pleadings and costs shall be similar to like proceedings in the court of common pleas in said county; and the said mayor's court shall also have the same chancery powers and jurisdiction, within the said city, as is now by law vested in the courts of common pleas; and shall also have the same power and jurisdiction, within the said city, as is now conferred by law upon the orphans' court of Luzerne county." Jurisdiction of divorce cases was afterwards conferred by the supplement to the act of incorporation; power is also given to this court to issue writs of *certiorari* to judgments of the aldermen of the said city as other courts of common pleas do. It possesses all the machinery and officers of other courts of record, viz: a clerk, seal and records, and its judgments are revisible on appeal and writ of error from this court, as are the judgments of other courts of general jurisdiction. It is, therefore, a court of

(Election of judges.)

record of general civil and criminal jurisdiction, within its territorial boundaries, beyond a question, and is so expressly declared; even without this express declaration, it would, from its constitution and powers, be a court of record. Furthermore, the 19th section of the act provides for the removal of all actions, prosecutions and appeals, at the election of the parties or either of them, from the judgments of justices of the peace, pending in the common pleas and quarter sessions of Luzerne county, having arisen within the limits of the city of Scranton, into the mayor's court for determination; and the arbitration laws of the commonwealth are extended to the said court.

These facts illustrate most clearly what we have already said, that the court in question is a court of record of general jurisdiction, as well as a municipal court; and it follows, that its judges are required by the constitution of the commonwealth, to be elected by the qualified electors included in the boundaries of the city, and cannot be designated and appointed by an act of the legislature.

The respondent claims to hold and exercise the office of judge of the mayor's court of the city of Scranton, thus established, under and by virtue of the 30th section of the act, which provides "that the president judge of the eleventh judicial district of the commonwealth, or of that district of which the county of Luzerne shall form a part, shall be the recorder of the said city," and shall receive an annual salary of \$500 for his services, payable one half by the state and the other half by the city. This is the commission relied upon as the authority for exercising the office of recorder of the city, by the respondent. We have shown that the mayor's court is not only a municipal court, but a court of general civil and criminal jurisdiction—is, in fact, a court of an independent judicial district. Now, in such a case, the constitution expresses itself in no ambiguous terms; it says, in Art. VI., sect. 2 (amendment of 1850): "The judges of the supreme court, of the several courts of common pleas, and of such other courts of record

(Election of judges.)

as are or shall be established by law, shall be elected by the qualified electors of the commonwealth, in the manner following, to wit, the judges of the supreme court by the qualified electors of the commonwealth at large; the president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, by the qualified electors of the respective districts over which they are to preside, or *to act as judges.*”

Here is a distinct mandate of the constitution, requiring the election of the recorder of this court by the people of the district or city; and whatever the constitution enjoins to be done in a particular way, amounts to a prohibition of all other modes and methods of doing the same thing. *Page v. Allen*, 58 Penn. St. R. 338. We have shown this mayor's court of Scranton to be a court of record, not only from its nature and necessary inherent powers, in view of its jurisdiction, but by the express words of the act creating it. The constitution requires the judges of “such courts of record as are or shall be established by law, and all other judges required to be learned in the law, (to be elected) by the qualified electors of the respective districts over which they are to preside, or act as judges.”

That the recorder is a judge, all text-writers, who speak of the office, affirm; the references in the argument of the attorney-general, clearly establish this. In 1 Bac. Abr. 657, it is said, that in the court of Hustings, at Guild-Hall, before the lord mayor and sheriffs, “when any matter is to be argued and determined, the recorder sits as judge with the mayor and sheriffs, and gives rules and judgments therein.” In *Respublica v. Dallas*, 3 Yeates 314, Shippen, C. J., said, “in the strict legal sense of the word, the recorder is a judge; he is a justice of the peace, and a constituent and principal member of a court of record.” In a constitutional view, the name is nothing; if it be the recorder's duty to act as judge of a court, as it certainly is under the act of incorporation, the consti-

(Election of judges.)

tution requires that he be elected by the qualified citizens over whom he is to judge. In this state, the recorders of the mayors' courts have always been appointed from persons learned in the law, and have ever been recognised as judges, with fixed salaries and specified terms of office. The act in question, by indirection, recognises this as a necessary qualification; no one can be recorder, by its terms, who is not the president judge of the court of common pleas of the judicial district, for the time being, in which the county of Luzerne shall be; as such president judge is required by the constitution to be learned in the law, it follows, that the recorder's office being filled by that incumbent, he will be learned in the law also. Whether, therefore, we regard this mayor's court as within the constitutional category of "such other courts of record as shall be established by law," or, that the recorder is to be regarded as a judge, or that he is required to be learned in the law, in either and all of these contingencies, he, by the constitution, must be elected. These requisites all co-exist in the constitution of this court, the provision, therefore, to confer the office of recorder upon the respondent directly by an act of assembly, was a clear violation of the constitutional mandate for an election; he could only fill that office by the choice of the people of the city at the polls.

Nor would he have been eligible, by election, to have filled the office, holding, as he did, the office of president judge of the common pleas of Luzerne county. Art. V., sect. 2 of the constitution prohibits judges holding "any other office of profit, under the commonwealth," during their continuance in office; and we have seen that a salary is attached to the office of recorder in this case.

But it was contended in argument, that the respondent having been elected president judge of the common pleas of Luzerne county, by the electors of the territory embraced in the city of Scranton, in common with the other portions of the county, he was, therefore, an elected re-



(Election of judges.)

recorder, in the sense of the constitution. This argument concedes the necessity of an election; but how, by one election, he could hold two distinct and independent offices, such as president judge of the common pleas and recorder of the mayor's court, is not so clear; we think the position totally inadmissible in its application to the question in hand and needs no argument to refute it. By such a process, every township in the county might be included in mayors' courts, and the judicial business, diverted from its legal centre, come to be administered in isolated portions of the county. We should not fully protect and conserve the constitution of our commonwealth, as we are bound to do, were we capable of yielding to such suggestions; nor ought we to be deterred from giving full scope to every one of its provisions, by appeals to consequences arising from misinterpretation and consequent violation; were such considerations to prevail, the instrument, in time, would disappear altogether, by attrition of repeated encroachments, and its very existence become traditionary. But we, by no means, concede the consequences anticipated and deprecated in the argument of the respondent's counsel; what they may be, is not before us; it is time enough to treat of them when they come before us.

In nothing said in this opinion is it, in the least, intended to reflect on the learned and able president of the common pleas who acted as recorder of the mayor's court of Scranton; that he was mistaken in assuming the discharge of those duties, we believe, but we fully accord to him the utmost conscientiousness in so doing.

Thus we have given some of the reasons inducing the entry of judgment in this case, in July last; more might be added, but we regard further elaboration unnecessary. We feel ourselves constrained to decide that the respondent was not legally the recorder of the mayor's court of the city of Scranton, and enter judgment accordingly.

Judgment for the commonwealth.

(Election of judges.)

Perhaps the greatest defect in our political system, is an elective judiciary, holding office for a limited term, and entrusted with extensive discretionary powers for the determination of political questions, especially those arising in cases of contested elections. Our British ancestors considered it a great triumph of free principles when, by the act of settlement, the judges were made independent, by the granting of commissions during good behavior, instead of holding, as formerly, at the pleasure of the crown. And at the date of the American revolution, this was considered one of the most precious of the liberties which the early colonists had brought with them from the mother-country. So excellent was this provision esteemed, that it has been incorporated into most of the reforms of modern Europe, whilst the American people, not having, until recently, experienced the evils of the opposite system, have abandoned it, at the instigation of demagogues who court the favor of the people by pandering to their worst passions.

Chancellor Kent says that "in monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics, it is equally salutary, in protecting the constitution and laws from the encroachments and the tyranny of faction." 1 Kent Com. 293-4. "The organization of the judicial department is not so essential, as the supply of intelligent, learned and honest judges to administer the laws. The danger to be apprehended, as all past history teaches us, in governments resting, in all their parts, on universal suffrage, is the spirit of faction, and the influence of active, ambitious, reckless and unprincipled demagogues, combining, controlling and abusing the popular voice for their own selfish purposes. Much more grievous would be such results, when applied to the election of judges, for that would tend to break down and destroy the independence and integrity of the administration of justice." Ibid. 295 note.

Since this innovation upon the earlier and wiser policy of the republic, the unwelcome truth is forcing itself upon the attention of every cultivated mind, that the standard of judicial ability is steadily decreasing; the truly learned lawyer (with a few notable exceptions which only prove the rule) stands no chance of elevation to the bench; the man to whom Coke and Fearn have been familiar from his student-days, is not the one selected to decide upon questions affecting the life, liberty and property of his fellow-citizens; but, as a general rule, it is the half-

(Election of judges.)

educated pretender, who knows just enough law to try a quarter sessions case, in a decent manner, and who has little enough self-respect to play the demagogue, and court the suffrages of the *dear* people, who is chosen to administer our laws in the courts of justice.

We do not expect superhuman acts of heroic virtue from frail men, but so unmitigated have become the evils of the present system, that men of sense have ceased to expect honesty or impartiality in our judges in the decision of political questions. Indeed, so far has this spirit of partisanship been carried upon the bench, that we have seen grave constitutional questions, involving the most sacred rights of the people, after having been solemnly decided by courts of last resort, deliberately overruled on a change in the political complexion of the court, resulting from a popular election. The system has degraded the judiciary, rendered them the slaves of party, and lost for them that respect which was, in happier times, cheerfully accorded by the people.

The decision in *Commonwealth v. Conyngham*, clearly renders unconstitutional the holding of the mayor's court of Carbondale; *Purd. Dig.* 703; and its effect upon the recorder of the city of Philadelphia, is a subject of grave consideration; though not now a judge of a court of record, he is still a judge, with power to issue the writ of *habeas corpus*; and above all, he is a justice of the peace, *ex officio*, and the constitution is as explicit in regard to the election of justices of the peace, as it is with respect to the election of judges; its evident purpose was, that no man should pass upon the rights of his fellow-citizens, either civilly or criminally, who did not derive his authority from the votes of the people of his district. It is to be hoped that the attorney-general will test the right of this officer, as he has done that of Judge Conyngham. See *Rhoads v. Commonwealth*, 15 Penn. St. R. 277; *Schumann v. Schumann*, 6 Phila. 318; *Gibbons v. Sheppard*, 65 Penn. St. R. 32. These cases do not settle the question, as it is evident that the validity of the recorder's commission could not be brought into question collaterally.

The point decided in *Commonwealth v. Conyngham*, has been before the supreme court of California on several occasions; in *People v. Hastings*, 29 Cal. 449, it was decided that, under a constitutional provision, that assessors and collectors of town, county and state taxes should be elected by the qualified electors of the district, county or town in which the property taxed for state, county or town purposes is situated, a tax was invalid which had been assessed by an officer

## (Election of judges.)

elected for a district embracing a more extended area of territory than that in which the property in question was located. In *People v. Kelsey*, 34 Cal. 470, the same court determined, that it was not competent for the legislature to transfer the powers of an office which the constitution requires to be filled by election, to the incumbent of another office. And in *Christy v. Supervisors of Sacramento County*, 39 Cal. 3, that when the constitution declares an office to be elective, it cannot be filled in any other manner. But in this last case it was determined, that where an office has been filled by election, it is competent for the legislature, to extend the term of the incumbent, provided the whole term, when extended, do not exceed the time limited by the constitution.

A similar question arose in Connecticut, in the case of *Brown v. O'Connell*, 36 Conn. 432. The constitution of that state provides that judges "shall be appointed by the general assembly, in such manner as shall, by law, be prescribed;" the legislature erected a police court for the city of Hartford, and provided for the appointment of a judge of that court by the common council of the city; but it was held by the supreme court of errors, that such appointment was void, that the power of appointment was in the general assembly, required for its exercise the direct action of that body, and that its functions could not be delegated to the common council. And the doctrine is fully recognised in New York, in *People v. Raymond*, 37 N. Y. 428; *People v. Acton*, 48 Barb. 524; and *People v. Blake*, 49 Barb. 9.

## COMMONWEALTH v. AGLAR.

In the Municipal Court of the City of Boston.

JANUARY TERM 1835.

(REPORTED THACHER'S CRIMINAL CASES 412.)

[*Criminal prosecutions for illegal voting.*]

A defendant is not liable, criminally, for illegal voting, unless he knew, at the time, that he was not a qualified voter, and that he was doing or attempting to do an illegal act; if he honestly believed that he had a right to vote, it is not a wilful act, punishable by indictment.

To constitute a wilful aider and abettor of such offence, the party must have known, at the time, that the principal was not a qualified voter; and with such knowledge, must have said or done something designed and calculated to encourage him to vote.

The inspectors may refuse the vote of a disqualified person, though his name be on the registry list.

This was an indictment charging Francis Aglar with having illegally attempted to vote at an election in the city of Boston, on the second Monday of November 1834, and Ralph Huntingdon with having aided and abetted him in so doing. The defence of Aglar rested on the ground, that he acted innocently, and under a mistake of right; that of Huntingdon, that he assisted Aglar, and encouraged him to vote, finding his name on the list of qualified voters, and supposing that to be conclusive evidence of his right.

*Parker*, for the commonwealth.

*Hallett, James* and *Park*, for the defendants.

THACHER, J., delivered the following charge to the jury. The defendants are on trial for several violations of the law of 1813, ch. 68, which was intended effectually to secure to the people of this commonwealth the right of

(Criminal prosecutions for illegal voting.)

suffrage. The accusation against Francis Aglar is, that he, knowingly, designedly, wilfully and fraudulently attempted to vote, and give in a ballot of persons voted for, at the election of a representative to the congress of the United States from the first district, and for governor, lieutenant-governor, counsellors and senators, and for representatives to the general court of this commonwealth, on the second Monday of November 1834, in the city of Boston, said Aglar being an alien born, and not having been naturalized, and so not, having a right to vote at that election, and well knowing himself not to be legally qualified to vote at said meeting. The charge as to Ralph Huntingdon is contained in the same indictment, and accuses him of the offence of wilfully aiding and abetting the said Francis Aglar in attempting so to vote illegally as aforesaid. As the case relates to the freedom and purity of elections, the court has deemed it important, and has not felt disposed to restrain the counsel in the examination of witnesses, or in their arguments.

The indictment is founded on the third section of the act of 1813, ch. 68, which is in these words: "If any person, knowing himself not to be legally qualified to vote, at any meeting for the choice of governor, lieutenant-governor, senators and counsellors, representatives to the general court, or representatives to congress, shall wilfully give in, or attempt to give in, a vote or ballot for any of the same, then voted for at any such meeting, every person so offending shall forfeit and pay a fine therefor, not exceeding the sum of fifty dollars; and any person who shall wilfully aid or abet any person, not legally qualified as aforesaid, in voting or attempting to vote, contrary to the provisions of this act, shall forfeit and pay a fine, not exceeding thirty dollars, for each and every such offence."

Upon you rests the responsibility of the verdict; and that you may correctly perform your duty, you should understand the nature of the offence. The party voting

(Criminal prosecutions for illegal voting.)

or attempting to vote, must know, at the time, that he is not a qualified voter, and that he is doing or attempting to do an unlawful act; if he voluntarily give in a vote, with this knowledge, at the time, his offence is consummated; it is done wilfully, and he incurs the penalty.\* To constitute a wilful aider and abettor in such an act, he too must know, at the time, that the person was an unqualified voter, and had no right to vote; and with such full knowledge, he must have done or said something which, in the opinion of the jury, was designed and calculated to encourage the party to vote or to attempt to vote. If the person charged as an abettor should honestly, though erroneously, believe, at the time, that the party voting or attempting to vote, had a right to do so, he will not be within the statute; for the offence, both of the principal and the abettor, is made, by the statute, to consist in having the guilty knowledge of the lack of legal qualifications, and the wilful intent to do the unlawful act; therefore it is, that knowledge is not to be presumed in such case, but is to be alleged and proved like any other fact. To make a person guilty of harboring a traitor or a felon, he must have, at the time, a full knowledge that the treason or felony has been committed; without this knowledge, no guilt can possibly be imputed to an individual who shall extend to the traitor or felon the common offices of humanity.

I consider that a free people ought to be jealous of their rights; it is the only way to preserve them.† Foreigners,

\* "By wilful," says Wilson, J., 1 East 563, n., "I understand, contrary to a man's conviction."

† The American people appear to have lost much of that sturdy spirit of freedom that animated their ancestors, at the period of the Revolution; they were then, in the main, a nation of unmixed blood, and imbued with all that jealousy of any encroachment on their rights, that ever pervaded the ranks of their Anglo-Saxon forefathers; now they appear to be almost a different race of people, and the true idea of political freedom is fast disappearing from among them; but unless this be revived, the inevitable result must be anarchy or despotism. Even their dread of a bastard public opinion, and the readiness with which they submit to encroach-

(Criminal prosecutions for illegal voting.)

not naturalized, who shall presume to intrude into elections, should be indignantly resisted; for the sovereign power actually resides in the people; they elect their rulers to administer the government, according to the constitution; when an alien, not naturalized, presumes to vote at an election of our rulers, it is a wrong done to every citizen. It is the nature, perhaps, the life of free governments, to generate parties; but when a foreigner, or other unqualified voter, gives in a ballot at an election, it is a wrong to the voters of every party, without reference to the candidate for whom he votes; if one party should, by such means, gain an unlawful victory, at one election, their antagonists will perhaps prevail, by like means, at the next. The state will become corrupt, and gradually lose its free character; elections will come to be decided by illegal votes, and the people will, in time, find themselves governed by rulers not of their choice.\* I say, therefore, that it is a common injury; and I hope that, while any virtue remains in the people, they will be watchful over each other, and so preserve the foundation of the free body politic. If any citizen should become so recreant to duty, and to the principles of free government, as wilfully to aid and abet foreigners in attempting to vote at our elections, before they shall have been naturalized, he ought to be made to suffer the penalty of the law.

But I am bound to add, that there has been, I believe, a neglect of caution, in times past, which may have led many well-disposed foreigners to consider themselves legal voters, when they were not, in fact, entitled to that privilege; having resided here for years and paid taxes, finding also their names on the lists of voters, they have been per-

ments upon their political rights by the overgrown corporations that exist among them, should convince the candid observer of this unwelcome truth. The individual is lost in the community.

\* The learned judge has graphically described the state of the nation, in the year of grace 1871.



(Criminal prosecutions for illegal voting.)

mitted to vote and serve as jurors, without distrusting their own right or having it questioned by others. But until an alien has been naturalized, he is not a citizen, and is not entitled either to vote or to serve on a jury; the payment of taxes is a return for the protection of the government; neither length of residence nor payment of taxes will constitute citizenship. If he was not born in the country, or, if born abroad, if his parents were not citizens of the United States, not having renounced or forfeited their allegiance, he is a foreigner, and must conform to the laws which regulate naturalization, before he can hold real estate, or exercise the freedom of election, as a citizen of the country.

It follows, from these views of the law, that if a foreigner, who has not been naturalized, should vote at an election, his vote not being legal, yet, if he honestly believed, at the time, that he had a right to vote, it would not amount to that wilful act which is forbidden in the statute. And so also, if a person should aid and abet such foreigner in attempting to vote, if it should appear to the jury, that he honestly believed that the foreigner had a right to vote, they ought to acquit him of the offence. Whether a person is a qualified voter, is a question compounded of law and fact; those who prepare the lists may inadvertently err in their judgment and lead others into error. If an alien, having resided in the country for many years, and finding his name on the list of voters, should use the privilege without question, it would be for the jury to consider, whether he might not naturally be led to believe that he was a qualified voter; but if, presenting himself at the polls, and being interrogated, he should falsely assert, that he had conformed to the laws of naturalization, a jury might reasonably infer from that falsehood, that he knew, at the time, that he was not a legally qualified voter. Even a citizen may be ignorant of the law, and may innocently believe that, if the mayor and aldermen have placed the name of a person on the list of

(Criminal prosecutions for illegal voting.)

voters, it is conclusive evidence of his right, not to be questioned by the ward officers; whether such citizen acted wilfully, in aiding and encouraging an unqualified alien to vote or to attempt to vote, must be decided by the jury, under all the circumstances of the case.

It has been argued, that the ward inspectors in this city may not question the right of one whose name is borne on the list of qualified voters, nor refuse to receive his vote; on this point, I have been requested to state my view of the law. No person, although a qualified voter, is permitted to vote at an election, unless his name is borne on the list; although the name of an unqualified person may be borne on the list, by mistake, it would not authorize *him* to vote; he would do so at his peril. The name on the list will justify the inspectors in receiving his vote, because it is not declared to be their duty to institute an inquiry; they may, however, lawfully refuse the vote of one who is not a legal voter, though his name be borne on the list, when that fact has come to their knowledge, by the confession of the individual himself, or otherwise. In refusing to receive an illegal vote from an unqualified person, they do no injury to him, they prevent fraud, and they perform a meritorious act to the public, since it tends to keep elections pure, and to perpetuate our government and laws in pristine health and vigor. It is part of the ministerial office of the inspectors, to prevent "all frauds and mistakes in elections," and to place a check against the name of each voter. In refusing the vote of one whose name is on the list, they would act upon their own risk, and would, undoubtedly, be liable to the action of the party, if he were a legal voter; just as the mayor and aldermen would be liable to the action of a qualified citizen, whose name they should wrongfully refuse to insert on the list, whereby he should lose his privilege; still, if the party had no right to vote, at the time, he would sustain no wrong in either case, and therefore, he would be entitled to no redress.

(Criminal prosecutions for illegal voting.)

The first fact to be settled by you is, whether Francis Aglar attempted to give in a vote, at the election held on the second Monday of November 1834. If you should not be satisfied that he made this attempt, he must be acquitted; and it would then follow, that Ralph Huntingdon must be acquitted also, because his offence is charged as accessory to that of Aglar. But it may be, that Aglar did attempt to vote at that meeting, in which case, it will be necessary for the jury to inquire further, whether it was done wilfully, he having, at the time, the knowledge that he was not a qualified voter; if they are not satisfied that he acted wilfully, he must be acquitted. But even if Aglar should be acquitted for this cause, if he made the attempt to vote through the wilful persuasion of Huntingdon, knowing, at the time, that Aglar was not qualified to vote, then, though Aglar should be acquitted, it would be the duty of the jury, to find Huntingdon guilty; it would amount to a substantive offence in Huntingdon; and it is not necessary, like the case of an accessory in the commission of a felony at common law, that the conviction of the principal should precede that of the accessory.\* Therefore, if Aglar did not attempt to vote, Huntingdon must also be acquitted, whatever feeling or zeal he may have manifested at the time; if Huntingdon advised Aglar to vote, and promised to stand by him, in case he would vote, still, if Aglar did nothing in consequence of this advice and tender of protection, the offence was not consummated. It is not made an offence, under this statute, to advise an unqualified person to give in a ballot, not even if such advice be accompanied with an offer of protection; it may have been very improper, and contrary to the duty of a good citizen, to give such advice to an unqualified person, but that is not declared to be an offence, and that is not the charge for which Huntingdon is on trial.

\* *Sed quere*, whether it would not be necessary that Huntingdon should be separately indicted for a substantive offence?

(Criminal prosecutions for illegal voting.)

It does not appear, that there was any previous concert between Aglar and Huntingdon; they were strangers to each other; all occurred in the ward-room, during the heat of the election. Aglar came to the polls, with a vote in his hand, undoubtedly intending to vote; as soon as he appeared, and before he tendered his vote, one of the inspectors asked him, whether he was a naturalized citizen; he immediately answered that he was not; he was then told, that an alien, not naturalized, was not a legal voter, and that if he voted, it would be at his peril; he said, he had been in the country for 24 years, had paid taxes, his name was on the list of qualified voters, and that he had voted at former elections, without question; he was told by the inspectors, that his name was indeed on the list, and that they would receive his vote, but that, if he was not a naturalized citizen, he would be liable to prosecution. While this conversation was proceeding, Huntingdon came forward, and having learned that Aglar's name was on the list, insisted that that was conclusive evidence of his right and qualification, and urged him to vote, promising, at the time, to hold him harmless from the consequences; Aglar said that, if he was entitled to vote, he should be glad to do so; but if he was not authorized, he would not vote. After a very animated contest, in which the inspectors offered the ballot-box to Aglar to receive his vote, but without any attempt on his part to give it in, he and Huntingdon left the room, in order to obtain legal advice on the subject. They went to Samuel Dexter, Esq., and from him to Andrew Dunlap, Esq., by whom they were advised, that an alien, not naturalized, could not lawfully vote at that election; Aglar did not return to the polls; but Huntingdon came back, asked the names of the inspectors and threatened to institute a prosecution against them for refusing the vote. The warmth on both sides led to further inquiry and resulted in this prosecution. It is not politic to attempt to restrain, by severe regulations, the freedom of

(Criminal prosecutions for illegal voting.)

elections. It is well, that the people should be alive on these occasions; it is proof that they love their country, and take an interest in the government; apathy is the worst state into which a free people can fall; all parties should stand for their rights. Errors committed by individuals, in the fervor of the moment, ought not to be severely criticised; but it is for the best interests of the people, that wilful violations of the law should be punished.

Verdict for defendants.

---

In Rhode Island, the principal point decided in *Commonwealth v. Aglar*, has been affirmed by the supreme court; it was there decided, in *State v. Macomber*, 7 Rhode Island 349, that to warrant a conviction for illegal voting, the ballot must be *fraudulently* cast, that is, with knowledge by the voter of his disqualification; and that an honest mistake by a voter, as to his right, though with knowledge of all the facts, and an assertion of it by voting, would not render him liable to a criminal prosecution. Whether the offence was wilfully committed is a question for the jury. *Commonwealth v. Wallace*, Thach. Cr. Cas. 592. In Tennessee, however, it is held, that ignorance of the law will not excuse illegal voting, but that, in order to convict, it must appear that the voter knew of a state of facts which would, in point of law, disqualify him. *McGuire v. State*, 7 Humph. 54. In California, the law is held to be, that where an unlawful act is proved to have been done by the accused, the law, in the first instance, presumes it to have been intended, and the proof of justification or excuse lies on the defendant. *People v. Harris*, 29 Cal. 678.

In Massachusetts, evidence that the defendant consulted counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right, is admissible in his favor, on the trial of an indictment for illegal voting, but is not held to be conclusive. *Commonwealth v. Bradford*, 9 Met. 268. In North Carolina, the unlawful purpose, is held, *primâ facie*, to attach to the act, and that the opinions of others, who believed the vote lawful, including that of the judges of the election, does not amount to a justification or excuse. *State v. Hart*, 6 Jones (Law) 389. And in the same state, it was determined, that where a defendant indicted for illegal voting, offered to

(Criminal prosecutions for illegal voting.)

prove that he was advised by a respectable gentleman, though not a member of the bar, that he had a right to vote, such evidence was inadmissible, and fraud was to be presumed from the act of voting, as there was no excuse for ignorance of the law. *State v. Boyett*, 10 Ired. 336.

On such indictment, the defendant's statements, made at the polls, on being challenged, are not admissible evidence in his favor; nor is the decision of the election officers, in favor of his right to vote, any defence. *Morris v. State*, 7 Blackf. 607. In Alabama, it is held, that the act of voting is not complete, until the ballot is put into the box, and the name of the voter is registered by the clerks. *Blackwell v. Thompson*, 2 Stew. & Port. 348. But in Tennessee, the supreme court determined, that when a voter presents himself before the judges, hands his ticket to the officer, and his name is announced and registered, the act of voting is complete; it is not necessary that the ballot should have actually been put into the box. *Steinwehr v. State*, 5 Sneed 586.

Irregularities in the manner of holding the election, constitute no defence to an indictment for illegal voting. *State v. Cohoon*, 12 Ired. 178. But the election must have been legally held. *State v. Williams*, 25 Maine 561.

## STATE. v. MOORE.

In the Supreme Court of Judicature of New Jersey.

JUNE TERM 1858.

(REPORTED 3 DUTCHER 105.)

[*Requisites of indictment for illegal voting.*]

An indictment for illegal voting must specify the particular disability that disqualifies the defendant.

In an indictment for illegal voting, it is not necessary to charge that the defendant *fraudulently* voted; but in one for illegally *offering* to vote, it must be averred that the vote was *fraudulently* offered.

This was an indictment charging William J. Moore, the defendant, with having voted illegally, at the November election 1856; the defendant having been found guilty, a motion was made to arrest the judgment, on the ground of the insufficiency of the indictment; whereupon the court of oyer and terminer certified the case to the supreme court for its opinion. The substance of the indictment is set forth in the opinion of the court.

*Stockton*, for the defendant.

*Dayton*, attorney-general, for the state.

GREEN, C. J., delivered the opinion of the court. This indictment charges that the defendant, at an election held, pursuant to the statute, for electors of president, &c., did wilfully and unlawfully give in his vote for the officers aforesaid, being the officers to be chosen, he, the said William J. Moore, then and there not being duly qualified to vote at said election for said officers, and then and there well knowing himself not to be duly qualified to vote at said election for said officers, against the form of the

(Requisites of indictment for illegal voting.)

statute, &c. The indictment is founded on the 50th section of the act to regulate elections (Nixon's Dig. 223), which enacts as follows: "any person who shall vote, or shall fraudulently offer to vote, at any election held under this act, or at any township or ward election, who shall not have been a resident of this state for one year, and of the county in which he votes five months next before the election, or who, at the time of the election, is not twenty-one years of age, knowing that he is not twenty-one years of age, or who is not a citizen of the United States, knowing that he is not such a citizen, or who, by reason of any disability, is not duly qualified to vote at the place where and time when his vote is given or offered, knowing that he is not duly qualified, shall be deemed guilty of a misdemeanor," &c.

The offence created by the statute, and for which the defendant is indicted, may be defined to be, "voting at an election, held under the act to regulate elections, by a person who, by reason of some disability, is not duly qualified to vote at such election, knowing that he is not duly qualified."

It is objected, first, that the indictment does not follow the words of the statute, nor charge the offence therein described; the charge is not, in the language of the act, that the defendant did *vote*, but that he did "wilfully and unlawfully *give in his vote*." But voting and giving in a vote are precisely synonymous terms; they are so used in the very section on which the indictment is founded; its language is "any person who shall *vote*, or *offer to vote*, knowing that he is not duly qualified to vote, at the place where, and time when, his *vote is given* or offered;" giving the vote is *voting*, not offering to vote. The indictment, therefore, is not open to the objection urged upon the argument, that it is equivocal, and may mean, either giving the vote into the ballot-box, that is, voting, or giving it into the hands of the officer, that is, offering to vote.

Again, it is objected, that the indictment does not charge



(Requisites of indictment for illegal voting.)

that the defendant *fraudulently* voted. The statute does not require it; its language is, "any person who shall vote, or shall fraudulently offer to vote;" the objection requires the statute to be read thus, "any person who shall fraudulently vote or offer to vote;" but such is neither the phraseology nor the intent of the statute. A person who *votes*, knowing that he is disqualified, acts, of necessity, in fraud of the act; but a person may *offer* to vote, knowing that he is disqualified, in jest or banter, with no serious intention of voting, and therefore, such act is not, necessarily, fraudulent or criminal.

It is further objected, that the indictment does not charge, that the vote was given at an election held under the act to regulate elections, which is an essential part of the description of the offence. The charge is, that the vote was given "at an election held, pursuant to the statute in such case made and provided, for electors of president and vice-president of the United States, for a member of the house of representatives of the United States for the first district of the said state of New Jersey, for a governor of said state, for a member of the general assembly for the third assembly district of said county, for a sheriff and three coroners for said county." There is but one statute in the state, pursuant to which the election of these officers can be held, namely, the act to regulate elections; there is, therefore, in substance, an averment that the election was held under that act. In this and other particulars alluded to, the indictment lacks that technical precision and strict conformity to the phraseology of the statute constituting the offence, which is eminently desirable, but it is not thereby rendered fatally defective.

But the indictment is fatally defective in not specifying the particular disability which is relied on, as a disqualification of the defendant as a voter. It lacks, in this particular, the first essential of a valid indictment, inasmuch as it does not apprise the defendant of the precise nature of the offence with which he is charged, so as to enable

(Requisites of indictment for illegal voting.)

him to prepare his defence. It charges, indeed, that the defendant was not duly qualified to vote; but that is tantamount to charging that he labors under one or more of the numerous disabilities imposed by the constitution and the law. Under what disability does he labor? *That* specific charge the state must establish upon the trial; *that* charge the defendant may repel by his evidence; and *that*, by every principle of good pleading, the defendant is entitled to know from the face of the indictment itself. But how can he know, from this indictment, the particular charge upon which the state means to rely, or the evidence necessary to make good his defence? Under this indictment, the state may prove that the defendant is not white, or that he is not a citizen of the United States, or not a resident of this state one year, or of the county in which his vote was cast five months before the election, or that he was a pauper or a convict, or any other constitutional or legal disqualification. The defendant must come prepared to prove his color, his age, his citizenship, his residence, to rebut evidence of his being a pauper or a convict, or, if convicted, to prove a pardon. A charge so general and so indefinite is inconsistent with the well-settled rules of criminal pleading, and must, of necessity, embarrass, if not fatally prejudice, the defendant in making his defence.

But, aside from the general rules of criminal pleading, it is clear, that the statute itself indicates, and by implication, at least, requires a more specific charge. It does not enact generally that, if a person votes, not being duly qualified, he is guilty of a misdemeanor; but the provision is, that if a person laboring under one of diverse disabilities, some of which are particularly enumerated, votes, knowing of such disability, he shall be deemed guilty of a misdemeanor. Thus, if a person votes who, at the time of the election, is not twenty-one years of age, knowing that he is not twenty-one years of age, or who is not a citizen of the United States, knowing that he is not such

(Requisites of indictment for illegal voting.)

citizen, or who, by reason of any other disability which disqualifies him from voting, knowing that he is not duly qualified, that is, knowing of such disability, he is guilty of a misdemeanor. The provision of the statute is tantamount to an enactment, that if any person laboring under any disability which disqualifies him from voting, and knowing of such disability, shall vote, he shall be deemed guilty of a misdemeanor; the indictment must specify what the disability is, under which the defendant labors.

In an information or indictment under the game laws of England, it has been uniformly held, that it is not sufficient to aver that the person charged was not "duly qualified," or that he had not the legal qualifications for killing game; but every legal qualification must be specifically traversed. Thus, under the 22 & 23 Car. II., ch. 25, § 2, it must be averred, that the party complained of had not an estate of inheritance of £100 per annum, nor a leasehold estate for ninety-nine years of the yearly value of £150, nor was the son and heir-apparent of an esquire or person of higher degree, nor the owner and keeper of a park, &c. *Rex v. Hill*, 2 Ld. Raym. 1415; *Rex v. Jarvis*, 1 Burr. 148, 154; *Rex v. Wheatman*, 1 Dougl. 331; Crown C. C. 400. The necessity for a specification under our statute is much greater; for if a defendant, in an indictment under the game laws, shows that he possesses any one qualification, the existence of which must be within his own knowledge, his defence is complete, though he be destitute of every other qualification; he is able, therefore, to prepare his defence, however general may be the averment of disqualification. But under the election law, if it be proved, that the defendant labors under any one legal disability, he is guilty, though he possess every other qualification; unless, therefore, the particular disability, intended to be relied on, be specified, the indictment furnishes the defendant no guide to the preparation of his defence.

The precedent in Wharton, from which the present

(Requisites of indictment for illegal voting.)

indictment has been framed, affords no support to its validity. That indictment was framed upon the peculiar phraseology and adopts the language of the Massachusetts statute, which is totally dissimilar to our own; nor does it seem certain that it would be regarded as a valid indictment by the courts of that state. Wharton's Precedents § 1019; *Commonwealth v. Shaw*, 7 Met. 52; *Commonwealth v. Bradford*, 9 Ibid. 268; Davis's Justice 226. However that may be, it is perfectly clear that, under our statute, the indictment is fatally defective. The court of oyer and terminer should be advised accordingly.

---

The doctrine of the principal case equally applies to an indictment for unlawfully counselling and advising a disqualified person to vote; in such indictment the particular disability must be specified. *State v. Tweed*, 3 Dutch. 111. The law is held to be the same in Tennessee, where it has been determined, that an indictment that the defendant unlawfully and knowingly voted, not being a qualified voter in and for the county, is bad, though in the words of the statute; being a "qualified voter," is a legal result; there are various disqualifications, and the indictment must show which of them existed. *Pearce v. State*, 1 Sneed 637. But directly the contrary has been decided by the supreme court of Iowa; it is there held, that an indictment for voting at a legal election, the party knowing that he was not qualified, need not show how the defendant was disqualified; and that, under it, any disability may be shown, or the state may prove from the admissions of the defendant, or otherwise, that he knew he was disqualified, and that he was in fact disqualified, without proving in what the disqualification consisted. *State v. Douglass*, 7 Clarke 413. So, in *United States v. Quinn*, 12 Int. R. Rec. 151, it was held by the circuit court for the southern district of New York, that an indictment charging a fraudulent registration under the act of congress of the 31st May 1870, is sufficient, if it charge the offence in the words of the statute. And see *United States v. Ballard*, 13 Int. R. Rec. 195.

Being a local offence, it is necessary that an indictment for illegal voting should state with precision where the illegal vote was cast. *State v. Fitzpatrick*, 4 Rhode Island 269. But in Tennessee, it is unnecessary

(Indictments against election officers.)

to aver that the offence was committed knowingly ; the party is chargeable with knowledge of the facts which render his vote illegal. *State v. Haynorth*, 3 Sneed 64. And see *State v. Sheeley*, 15 Iowa 404. It is sufficient to state that the defendant voted at an election which was duly holden, without showing how, or by what authority, it was called. *State v. Marshall*, 45 N. H. 281. So, an allegation that certain persons were judges of the election, is a sufficient averment that they were duly made and appointed judges. *State v. Randles*, 7 Humph. 9. And see *Commonwealth v. Shaw*, 7 Met. 52 ; *State v. Douglass*, 7 Clarke 413 ; *State v. Bailey*, 8 Shep. 62. It is enough, that they were officers *de facto*. *People v. Cook*, 8 N. Y. 69. In Iowa, in such indictment it is unnecessary to aver that candidates for any particular office were voted for, or the names of the persons voted for. *State v. Minnick*, 15 Iowa 123.

---

## COMMONWEALTH v. MILLER.

In the Court of Quarter Sessions of Philadelphia.

JUNE SESSIONS 1849.

(REPORTED 2 PARSONS 480.)

[*Indictments against election officers.*]

An indictment charging, generally, that the election officers "did commit wilful fraud in the discharge of their duties," is fatally defective ; the particular acts must be specifically set forth.

The inspectors, judges and clerks cannot be joined as defendants in one indictment, their offices being different, and their duties distinct and separate.

These were two indictments against the election officers of the district of Penn, for a violation of their duties, at the general and presidential elections of 1848. To each of the indictments there was a general demurrer ; the case was argued before the four judges, *in banc*, and the opinion, in which the pleadings are fully stated, was the unanimous one of the court.

*H. M. Phillips* and *Read*, for the defendants.

*Clarkson* and *Reed*, for the commonwealth.

(Indictments against election officers.)

PARSONS, J., delivered the opinion of the court. This is an indictment against five defendants, the officers of the election in Penn district, charging them with a violation of the election law of 1839, in the discharge of their various and respective duties as inspectors, judges and clerks of the election held last fall. There are two bills charging the same offences as having been committed at the general and presidential elections; in each there are six counts.

1. The first count charges that John Miller, being and acting as judge of said election, John C. Senderling and George W. Morrison, being and acting as inspectors thereof, and John R. Hyneman and Thomas H. Palmer, being and acting as clerks thereof, having each been duly qualified to act as such officers, yet, being persons of evil-disposed minds, and wholly regardless of their duties as such, did commit wilful fraud in the discharge of their duties.

2. The second count charges that, being officers of said election as aforesaid, they did commit wilful fraud in the discharge of their duties in this, that they (naming them) did wilfully, fraudulently and unlawfully procure and cause to be written on the list of voters kept at such election, a large number, to wit, one hundred and fifty names of persons as having lawfully voted at such election, whereas, in truth and in fact, no such persons voted at the same, &c.

3. The third count charges, in the same way, that being officers, they did commit wilful fraud in the discharge of their duties, in this, that they did wilfully, fraudulently and unlawfully procure and cause to be counted and enumerated and marked on the tally-papers of said election, a large number, to wit, one hundred and fifty votes, as having been polled and received at such election, whereas, in truth and in fact, no such votes were polled and received.

4. The fourth count charges that, being officers of said

(Indictments against election officers.)

election, they did wilfully, fraudulently and unlawfully cause to be placed in the ballot-box provided at the election, a large number, to wit, one hundred and fifty tickets, as having been voted and received at such election, whereas, in truth and in fact, no such tickets were received from the voters at such election.

5. The fifth count charges that, being officers of said election, they did unlawfully, wilfully and designedly alter and change the lists of voters required to be kept at such election, and did interpolate therein, a large number, to wit, one hundred and fifty names of persons as having voted, whereas, in truth and in fact, no such persons voted at such election.

6. The sixth count charges that, being officers of said election, they did unlawfully, wilfully and designedly destroy the list of voters kept and made at such election, and did unlawfully substitute therefor, false and simulated lists of voters, purporting to have been made at such election.

To this indictment there is a general demurrer. The defendants object to this record, first, in detail, alleging that each count is defective and insufficient on which to found a judgment: it is then objected to in general; their counsel alleging that the joinder of all these defendants in one bill, cannot be sustained, under any rule which obtains in criminal pleading. I will consider these objections in their order.

The first count in this bill charges that the defendants did commit wilful fraud in the discharge of their duties at the election, without setting forth any facts which constitute the alleged fraud, or averring in what respect it was perpetrated, or any ground on which the accusation is made. The prosecution claims to sustain this indictment under § 102 of the election law of 1839, which declares that, "if any inspector, judge or clerk shall be convicted of any wilful fraud in the discharge of his duties, he shall undergo an imprisonment," &c.; and contends that

(Indictments against election officers.)

merely charging the crime in the language of the statute creating the offence, is sufficient. But it is objected by the defendants' counsel, that such a general charge in the bill, is *not* in accordance with the law relative to pleading in criminal cases, and that the want of specification as to any facts which indicate the fraud, renders this count bad; therefore, on that ground, the demurrer must be sustained. This is now the point for consideration.

In order that the rules which apply to this subject may be clearly comprehended, we will first inquire, what statement of facts is required to be set forth in bills of indictment charging offences at common law, and what, under statutes which create or define offences not known to the common law. In the former, it is a familiar principle, that the indictment must state the facts which constitute the crime, with as much certainty as the nature of the case will admit; that the allegations in the bill ought to be certain to every intent, and without any intendment to the contrary. 1 Chit. C. L. 140-2; 2 T. R. 586. Hence, it is laid down as a general rule, that all indictments ought to charge a man with a particular specified offence, and not an offence in general; for no one can know what defence to make to a charge thus uncertain; it cannot be pleaded in bar or abatement of a subsequent prosecution, nor can it appear that the facts given in evidence against a defendant on such a general accusation, are the same of which the indictors have accused him; nor will it judicially appear to the court, what punishment is proper on conviction. 1 Chit. C. L. 188; 2 Hawk. P. C. 320. It is said by Hawkins, "that in the indictment, the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court, that the indictors have not gone upon insufficient premises." Therefore, an indictment for burglary, which does not state the breaking to have been in the night-time, is bad; so, to state that one feloniously broke prison, without averring the cause of imprisonment, is insufficient; nor



(Indictments against election officers.)

could it be seriously contended for one moment, that an indictment charging one with stealing, without averring what was stolen, could be sustained; nor can any precedent be found for an indictment in a case of homicide, which does not show the means by which the offence was perpetrated. If, then, we were to apply the rule which almost invariably governs in cases of indictments for offences at common law, this first count will be found defective.

But it was contended on the argument, that the same strictness in pleading, where the offence is created by statute, is not required; and therefore, if the indictment lay the crime in the words of the statute, it is sufficient, without averring the facts or circumstances attending the transaction, which made the acts, alleged to have been done, criminal. But upon a careful examination of the authorities, I think it will be found, that the rules in relation to indictments charging offences created by statute, are the same that govern in cases of crimes at common law, with, perhaps, one exception. Therefore, we find it asserted by most of the law writers, as an elementary rule, that the principles which govern in relation to indictments at common law, generally, apply to offences created by statute; whatever precision is required in the one, is also necessary in the other; and it is often insufficient, merely to pursue the description of the offence given in the statute. 1 Chit. C. L. 227; 2 Hawk. P. C. 254. Hence, it is said by Hawkins, "neither doth it seem always sufficient to pursue the very words of the statute, unless, by so doing, you fully, directly and expressly allege the fact, in the doing or not doing whereof, the offence consists, without the least uncertainty or ambiguity." We find that in an indictment for obtaining goods by false tokens, or under false pretences, the *means* by which the offence was accomplished, must appear on the face of the record; 1 Hale P. C. 517, 526; 2 Ibid. 170; for, it is not enough to allege, generally, that the cheat was effected by means of certain

(Indictments against election officers.)

false tokens or false pretences; and the reason given by Grose, J., in his opinion in Fuller's case, is, that there may be some false pretences not within the statute, and therefore, they must be set out, that the court may see what they were. 2 East P. C. 831; 11 Mass. 136; Mart. & Yerg. 137. Numerous other cases of statutory offences might be cited, to illustrate the application of the rule, many of which will be found collected in 2 Hawk. P. C. 321, 354-5. To the same point is *Rex v. Mallinson*, 2 Burr. 679; 2 Stra. 1127.

Nor does this principle in relation to criminal pleading, in cases of offences created by statute, rest solely on English authority; such was held to be the law, by the circuit court of the United States for the eastern district of Pennsylvania, in the case of *United States v. Almeida*, tried at February Term 1849; an able and well-written opinion was delivered by Judge Kane, and is to be found in a note to Wharton's *Precedents* § 1061. That was a case in which the prosecution charged the defendant with a revolt on board a ship, under an act of congress making it an offence for any one of the crew of any ship, upon the high seas, to be guilty of a revolt; the indictment charged the prisoner with a revolt, in the language of the law, without stating any of the facts or acts done by the prisoner, to show the revolt; on that ground, the court arrested the judgment, and held that merely charging an offence in the language of the statute, was not sufficient, as a general rule. The limitation in the application of the rule, which will be presently noticed, was recognised by that court. This case would seem to settle the question now under consideration; and when we reflect upon the high character of the court from which it emanates, perhaps, should be deemed conclusive upon the point. But the soundness of the doctrine does not rest on these authorities alone; the question has been definitively settled by our supreme court in the cases of *Commonwealth v. Gillespie*, 7 S. & R. 469; *Stewart v. Commonwealth*, 4 S. & R. 194;

(Indictments against election officers.)

and *Dock v. Chief Burgess*, 7 Watts 181. In this last case, the court say, "it is not sufficient in an indictment or popular action, to lay the offence in the very words of the statute, unless they expressly serve to allege the very fact, with all the necessary additions, and without a grain of uncertainty or ambiguity; the special circumstances necessary to individuate the offence must be stated."

To the general rule we have stated, there are, undoubtedly, exceptions; but, in our opinion, this case does not come within any of them. The exceptions, or perhaps, limits to the application of this principle, arise from the peculiar character of the offence charged; thus, an indictment against a common barrator, or one for keeping a common gaming-house, is good, without a specification of the acts; for the essence of the offence, in these cases, consists in its habitual character, or arises from a series of transgressions; so, an indictment under our act of assembly, for selling vinous or spirituous liquors by a less measure than one quart, is good, without alleging to whom the sale is made, for the essential ingredient of the crime is the sale. But a conviction, under the statute of 43 Eliz. ch. 7, for cutting down divers lime-trees, was quashed for uncertainty. *Regina v. Burnaby*, 2 Ld. Raym. 900.

This rule, which seems to be so well established, is not arbitrary in its nature, but is founded upon the plainest principles of reason and common sense. Nothing can be more reasonable, than that the prosecution, in a criminal case, should state the facts specifically which, it is supposed, constitute the offence, with as much certainty as the nature of the crime will admit. It should be done, in order that the court may see that the case comes within the statute; for there may be alleged frauds perpetrated, which would not always render those who are acting as officers of the election liable under the 102d section of the law already cited. There may be acts done by them as individuals, which had no connection with their official

(Indictments against election officers.)

duties, and independently of any connection with their conduct of the election; for such acts, they could not be held amenable under this section. For aught the court can know from this record, such may have been the wrongs complained of.

Another reason why the specific acts, which constitute the alleged fraud, should be stated, is, in order that the accused may know what they must prepare to answer. This count alleges that they "did commit wilful fraud in the discharge of their duties." Is such a general allegation as this sufficient? are they not entitled to some notice in what the prosecutors assert this fraud to consist? should there not be some specification, an averment of some one fact, which would admonish them of what will be the accusation they must answer on the trial? They were officers, acting under the sanction of an oath, enjoying the confidence of their fellow-citizens, as manifested by their election to the stations which they held; surely, it would have been but fair and reasonable, that the commonwealth should specify upon the record something, some act, which would individuate the alleged fraud. In our opinion, the law requires it should be done; it is the law of England, of the United States and of Pennsylvania; a right to seek a simple and intelligible statement of what one shall be called upon to answer, is what the citizen may demand. It is given in all similar accusations for crimes; and the want of such averment renders this first count bad, and therefore, as to that, judgment must be entered for the defendants on the demurrer.

To the next four counts there are two objections; first, that although these counts contain an allegation of acts which constitute the fraud complained of, yet, the facts are not stated with that precision and certainty which the rules of pleading require. The law is clear, that the specific acts alleged to have been done by the accused, which bring his conduct within the prohibitions of the statute, must be stated with as much certainty as the nature and

(Indictments against election officers.)

circumstances of the case will admit; without such specification of facts, the record cannot sustain a verdict. In prosecutions for larceny, the indictment must describe the property stolen with reasonable certainty, not only what the property was, but its nature and character; so, in burglary, there must be an allegation what premises were entered, and who was the owner or possessor when the breaking occurred; in homicide, the means by which the deed was done must be stated on the record. So with regard to offences created by statute; therefore, an indictment charging the defendant with obtaining money by false pretences, without stating what the particular pretences were, is bad; and not only so, but the property of which the prosecutor was defrauded, must also be described with reasonable certainty. 1 Chit. C. L. 140; 2 Hawk. P. C. 321; 2 Stra. 1127; 8 Penn. St. R. 260; 2 Whart. C. L. § 2155. The indictment must also state the goods to be the property of some person named, and when no name is laid, the indictment will be quashed. *Regina v. Parker*, 3 Ad. & Ellis 292; 8 C. & P. 196. So also, an indictment for procuring money by false tokens, under the 21 Hen. VIII., must aver what the tokens were; likewise, an indictment for words spoken of a magistrate, in the execution of his office, must set forth the words; and nothing is better settled than that, in a prosecution for perjury, the pleader must state upon the record the language used by the accused when he committed the offence.

Let us apply this settled rule of law to the second count of this indictment, which charges that the defendants "did fraudulently procure and cause to be written on the list of voters kept at such election, a large number, to wit, one hundred and fifty names of persons, as having lawfully voted at such election, whereas, in truth and in fact, no such persons voted at the same." Is, then, this specification of the acts stated with that certainty which the nature of the case admits? The criminal pleader is

(Indictments against election officers.)

always presumed to be acquainted with the facts of the case, before he prepares a record statement of them, therefore, he must have known the names of, at least, some one, among this one hundred and fifty, if not all of them. It seems to us, that it is not requiring too much of the prosecution, when we say, they ought to set forth the names of some of them upon the record. It must be proved, on the trial, what are the names of the persons which, it is alleged, were fraudulently written on the list of voters kept at the election; it is the material point to be established before a jury; without establishing the fact of the names, thus entered on the list, of the individuals who did not vote at the election, as charged in the bill, the prosecution must fail; for it will not do to make the charge, without indicating who such persons were, by name. If so, why not give the names in the bill? Why should the prosecution be suffered to withhold or suppress them? In our opinion, a fair administration of the criminal law demands that it should be done, in order that the defendants may be apprised of what they must be prepared to meet on the trial. To them it is a matter of infinite importance; there may be a thousand names on the tally-list; under this bill, how can the defendants know which name, out of this one thousand, the prosecution will select, as an individual who did not vote, whose name is recorded? Must they be put to the trouble and expense to subpoena those thousand voters to defend themselves against this charge, if they are innocent? without so doing, how can they, with safety, go to trial? And even then, more might be required, for some of those who voted may have left the state, and other proof may be necessary.

It appears to us, that no charge ought to be tolerated in an indictment, which would thus embarrass the accused, who are always presumed to be innocent until their guilt is established. The rules of pleading are not arbitrary, but are founded upon the soundest reason, when they re-

(Indictments against election officers.)

quire that a prosecutor shall state the accusation with as much certainty as can be admitted by its nature and character. In this count, it has not been done; the names of the persons which, it is averred, were put upon the tally-list, but who never voted, could have been stated in the bill, yet they are not. We think the law requires such a statement (justice and fairness to the accused demand it); and that there is no such precision in the averment of facts which constitute the crime, as is usual in similar cases, where offences have been prohibited by statute. It is difficult, nay, impossible, to see why this case should form an exception to the general rule, particularly, when it was so easy to have made the statement with that precision which would have given full and fair notice to the accused. These remarks apply, with equal force, to the 3d and 5th counts; but I do not think, the 4th and 6th counts are embraced within this principle, nor can this objection be made to them.

Yet, it is contended that, if the first count be bad, and judgment be given for the defendants on the demurrer, as to that count, and it fall, all the others must necessarily fall with it, because there is no allegation in either of the other counts, that the defendants were inspectors, judge and clerks, but all the subsequent counts refer to the first count, as their antecedent, for this averment. That the indictment must state the particular office which each held at the election, and their various stations be designated, when prosecuted for official misconduct, I think, is clearly settled in the case of *Commonwealth v. Rupp*, 9 Watts 114. But whilst we pronounce the first count defective, and rule that we must give judgment for the defendants on the demurrer, as to that count, I do not think it so clear, that where the first count is referred to, as for the "day and year aforesaid," "the county aforesaid," and "being officers as aforesaid," all the subsequent counts should be pronounced bad, because there is not a repetition of the distinct office which each held; for, it seems to be well settled,

(Indictments against election officers.)

that the defect of some of the counts in an indictment, will not affect the validity of the remainder; judgment may be given against the defendant upon those which are valid. 1 Bos. & Pul. 187; 1 Chit. C. L. 205. Therefore, it is held, although every count should appear, upon its face, to charge the defendant with a distinct offence, yet, one count may refer to matter in any other count, so as to avoid unnecessary repetition, as for instance, to describe the defendant as "the said," &c.; and though the first count be defective, or be rejected by the grand jury, this circumstance will not vitiate the residue. 2 H. Bl. 131; 1 Chit. C. L. 205. And it was said by Gould, J., in the case cited from H. Bl., "that he remembered a case of an indictment for forgery, in which there were three counts for the forgery, and three for the utterance; in the first count, the prisoner was particularly described, and the grand jury rejected the first three counts; an objection was raised, that the remaining counts described him '*the said A. B.*,' by reference to the first, but the judges held that the description was good, and that the latter counts might refer to the former."

This principle seems to be repeated by most of the best writers on criminal law. No reason is given in any of the cases, for this seeming paradox, in relation to various counts in indictments, for all say, that every separate count should charge the defendant as if he had committed a distinct offence. But I apprehend the true reason is this: while the court rule that the offence is not described with sufficient legal precision, and on that ground, refuse to give judgment for the prosecution, for the alleged crime thus defectively stated, they hold that the description of the defendant, the time, place and venue are laid with sufficient precision, and therefore, that this part of the first or previous counts may be referred to, for that is not pronounced invalid.\* It is upon this ground that I conceive

\* And see Commonwealth v. Kaas, 3 Brewst. 422.



(Indictments against election officers.)

the constant practice of the courts in this country has been recognised, to arrest the judgment on one or more of the counts, and to sentence on others, which are determined to be good; such, we know, is the practice in this state, and has been ruled to be the law by the supreme court of the United States. *United States v. Furlong*, 5 Wheat. 184; 8 S. & R. 420.

The case of *Rose v. State*, Minor 28, seems to be in opposition to this principle; in that case, one count in the indictment was quashed, and it was held, that this set aside the whole indictment; but upon what principle of previous decision this opinion is based, it seems rather difficult to determine. Still, I do not think it would be safe for us now, to disturb a practice which has been pursued by the courts in this state, following the English decisions, which date back as far as the year 1792 and before. Because we say, that the first count does not state the offence with that legal precision which would justify a verdict and judgment, we do not decide, that the parties are not sufficiently described, nor that all the other matters set forth in the same are not averred with sufficient certainty. And if there were no other objection, we should be disposed to hold, that the 4th and 6th counts, perhaps, might be sustained.

But there is one general objection to the whole bill which, if well taken, must dispose of the entire case, and it is this: the inspectors, judge and clerks are all joined in the same indictment. Can there legally be such a joinder, for an offence alleged to have been perpetrated under the 102d section of the election law? particularly, when the offices are different, when the duties are distinct and separate, and when an election may be held, and the judge not be called upon to perform a single official act in relation to the receiving or registering the votes? We will first consider this question on authority, and then upon principle.

The rule of law seems to be this: where the offence

(Indictments against election officers.)

arises wholly from any joint act, which, in itself, is criminal, without regard to any particular personal defendant, the indictment may charge the defendants either jointly or severally. But where the offence charged does not wholly arise from the joint act of all the defendants, but from such act, joined with some personal and particular defect or omission of each defendant, without which it would be no offence, the indictment must charge them severally and not jointly; for, Hawkins says, "it is absurd to charge them jointly, because the offence of each arises from a defect peculiar to himself." 2 Hawk. P. C. 342; 1 Chit. C. L. 220. Hence, it was decided, in the case of *Rex v. Weston*, 1 Stra. 623, that an indictment against six, jointly and severally, for exercising a trade, should be quashed, because there ought to have been distinct indictments. In the case of *Rex v. Philips*, 2 Stra. 921, six were charged in an indictment with perjury, and four of them pleading, were convicted; it was moved in arrest of judgment, that they could not be joined, and on that ground the court arrested the judgment. A case is reported in 6 Mod. 210, where there was an indictment against several for the neglect of a day of fasting by proclamation, which was quashed, because the indictment was joint and should have been several. 2 Hawk. P. C. 343.

It appears to us, that there never was a case where the rule, which has just been stated, could be more properly applied than in the present. In the first place, the duties of the inspectors are different from those of the other officers mentioned in the bill; they receive the votes and decide upon the qualifications of the electors who tender them; and it is only when the inspectors differ in opinion, in any particular case, that the judge is called upon to act; hence, an entire election may pass off without he, who is stationed there as judge, being called upon to perform any official act as to the reception of votes. The clerks have nothing to say about the reception or rejection of a vote;

(Indictments against election officers.)

it is their duty simply to record the names of those who, their superiors determine, are legal voters, when the tickets are received; the clerks never receive a ticket, nor can they put one in the ballot-box, or count them when told off; their duties are purely clerical. The acts and doings of these defendants, on this occasion, were not necessarily criminal in themselves, but were legal; and could only become criminal, by a violation of their duty. The two inspectors might have committed most of the acts charged in the bill, and the judge and clerks have been entirely innocent of any participation in the transaction; hence, we say, in the language of the law, "the offence charged doth not arise from the joint act of all the defendants, but from such, joined with some personal or particular defect or omission of each defendant (or a part of them), without which it would be no offence; when such is the state of the case, the indictment must charge them severally and not jointly." Nothing, then, can be more clear, than that it is a manifest error in law, to join all these defendants in the same indictment; and such a joinder of the parties necessarily entitles them to judgment on the demurrer as to the whole bill.

There are a few considerations which, it seems to me, will strike the common sense of every one, as to the propriety of the rule just stated and of its application to the present case. We know that the inspectors and judge are elected by the people, the clerks are not; a particular form of oath is prescribed by law for the inspectors; another and different one for the judge; and still another, varying in form and substance, is to be taken by the clerks, before they enter upon the duties of their office. Each of these three classes of officers moves in a different sphere; each has different and distinct functions to perform; and then to say, that all shall be charged in the same indictment for a highly penal offence, when, from the nature of some of the acts charged, some of the officers could not have participated in doing the act, or have prevented the same,

(Indictments against election officers.)

had they attempted, must convince the judgment of every fair-minded man that it is wrong.

Now, many of the acts alleged to have been done, might and must have been committed by the two inspectors alone, or by one inspector and the judge; how unreasonable to join the clerks and judge in the same bill, and thereby deprive them of the testimony of those who, if permitted to testify, would perhaps establish, beyond all doubt, their entire innocence, and show that some of them, at least, did not participate in the transaction. And what injury can be done to the commonwealth, by preferring several bills against them? If the two inspectors united in placing in the ballot-box the names of individuals who never voted, and required the clerks to enter them upon the tally-list, why not indict those who did the act, separately and alone, and call the judge and clerks to prove the fact? By such a severance of the charges, no injury can possibly be done to the prosecution, in the elucidation of the truth, and presenting the cause as the facts really transpired, which is the real design of every criminal prosecution; on the contrary, great good may be thereby accomplished. Under the system of pleading above indicated, and which the law has wisely prescribed, no injury will be done to the cause of public justice or to the defendants, and no one will have just ground of complaint; the accused will then have a fair chance to present their defence, in its true and legitimate form, and the prosecution can command the testimony of all persons who, it is supposed, could be cognisant of the transaction. Any bill of indictment which does not contain these important elements, is not in accordance with the great and fundamental principles of pleading in criminal cases, nor sanctioned in judicial proceedings.

The law has no meshes in which to catch the unsuspecting or unwary; its main design is, when an individual is called to the bar of public justice to answer for alleged misconduct, to hold him responsible, personally, for his

(Indictments against election officers.)

own misdeeds, and not for the defects or omissions of another; and to present him with a plain, unambiguous statement of the accusation against him; this he has a right to demand, and such a presentment no honest man will fear to meet. It is this which the defendants claim, in the legal issue which has been raised upon this record; and this, the court, in an upright and conscientious performance of duty, are bound to accord to them, as they are to the humblest man that appears in court. Guarded as we are by the law, and the wisdom of long-established principles, solemnly settled, our judgment must be rendered in favor of the defendants on this demurrer.

Judgment for defendants.

---

In *Commonwealth v. Gray*, 2 Duvall 373, it was ruled by the court of appeals of Kentucky, that an indictment charging the defendant, as one of the judges of an election, with knowingly and unlawfully receiving the vote of an unqualified person, was sufficient, without showing whether the sheriff or the other judge was in favor of, or opposed to, allowing the illegal vote to be cast. And it was said by Robertson, J., in delivering the opinion of the court, that "*primâ facie* both judges concurred, or the appellee and the sheriff co-operated in receiving the unlawful vote; and if there was such co-operation, the other concurring officer or officers may have been ignorant of the illegality, and therefore, innocent; or, if guilty, that cumulative guilt could not exculpate the appellee, who should be personally and severally liable for his own unlawful act, in receiving, as charged, the illegal vote; it was not at all necessary, therefore, to show how the other officers acted." And see *Commonwealth v. Ayer*, Cush. Elect. Cas. 674.

## LAVAL v. MYERS.

In the Court of Appeals of South Carolina.

APRIL TERM 1830.

(REPORTED 1 BAILEY 486.)

[*Wagers upon elections.*]

A wager upon the result of the election for President of the United States, is contrary to public policy, and no action can be maintained for its recovery.

This was a summary process, tried in the city court of Charleston, at November term 1829, for the recovery of a wager on the result of the last election for president of the United States. The wager was laid after the election by the people for members of the legislature, but before the college of electors had been chosen by the legislature. The defendant demurred, and the plaintiff joined in demurrer.

THE RECORDER delivered the following opinion in the court below. The old cases upon the subject of wagers have been subsequently declared, by different judges, to be of little or no value; their legality was not made a question at the trial, but was always assumed, and the courts have since said, that were such cases now to be brought, they would be differently decided. Lord Ellenborough, in *Gilbert v. Sykes*, 16 East 157, said, "it is no new principle in the law, that if a contract have a tendency to a mischievous and pernicious consequence, it is void; I am aware, that in old cases (precedents of which are to be found in *Hearne's Pleader*), actions have been maintained upon wagers open to an objection of this sort, but not decided upon that ground, which was not adverted to; the first of those reported is *Andrews v. Herne*, 1 Lev. 33,

(Wagers upon elections.)

where the bet was upon the life of one who was held to be king *de jure*; and yet no point was made as to the validity of the contract, on the ground of its impolicy.\* Le Blanc, J., speaking of this case of *Andrews v. Herne*, remarked, "I have no hesitation in saying, that that bet would never have been sustained in these days." 16 East 162. Lord Ellenborough further observed, in reference to the case of *Da Costa v. Jones*, Cowp. 729, which was upon a wager as to the sex of the person who passed under the name of the Chevalier D'Eon, "that it was brought several times before the court, before any objection was taken on the ground of its immoral tendency." 16 East 158. And in reference to *Lord March v. Pigot*, 5 Burr. 2802, which arose out of a conversation between two sons, as to which of their respective fathers would live the longest, upon which a third person had stepped in and taken up the bet with one of the young gentlemen, Le Blanc, J., said, "that case was considered chiefly on the doubt, whether or not it was a bubble bet, as one of the fathers happened to be then dead." 16 East 162.

The great case, however, in which the legality of wagers, in England, is said to have been first fully argued and decided, is that of *Da Costa v. Jones*, in 1778, Cowp. 729. Before that time there was one, reported in 1 W. Bl. 19, by the title of *Walkhouse v. Derwent*, which was deserving of more attention than it received; and which, if followed, would have saved a great deal of subsequent regret and embarrassment. A wager had been laid, that the court of king's bench would quash an order of two justices, in a certain cause; and articles were drawn, by which the defendants agreed to bring a *certiorari* to try it, which they never did; on their default, a suit was

\* In point of fact, the plaintiff, in *Andrews v. Herne*, laid a wager of £20, that Charles Stuart (who was then in exile) would be king of England, within twelve months; and the defence was, that there was no consideration, as he was king *de jure* at the time of the promise; but the plaintiff recovered. 1 Lev. 33.

(Wagers upon elections.)

instituted on the articles, on which the defendants moved that the proceedings might be stayed and the articles delivered up; the court declined to hear it, using these words: "we desire the gentlemen would make an end of it between themselves, and let us hear no more of it, it being a very improper thing." In the marginal note, Sir William Blackstone gives *his* understanding of the case thus: "the court will not decide wagers." No notice appears to have been taken of this case in *Da Costa v. Jones*. In *Good v. Elliott*, 3 T. R. 702, Ashhurst, J., said, "as to the general ground, namely, whether an action will lie on any wager, that question does not now appear to be open to argument; it having been settled by so many authorities, both ancient and modern, and particularly in the case of *Da Costa v. Jones*, where Lord Mansfield, though he expressed a strong wish, that the practice of laying wagers might be abolished, said, that indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by any particular act of parliament; and the restraints imposed in particular cases support the general rule." The decision of the court conformed to this opinion; but Buller, J., dissented *toto cælo*, and was opposed to wagers being countenanced by the courts at all.

The later opinions of the bench have approximated to his, as closely as they could, with a due respect to this decided case. The following is the strong language of the judges, in the case of *Gilbert v. Sykes*, 16 East 150, already referred to, which was decided in 1812; Lord Ellenborough, C. J., after showing that the old cases had been ruled, without considering the impolicy of the practice, said, "upon the whole, therefore, not without some degree of doubt, whether Mr. Justice Buller was not right, in saying that no wagers ought to be sustained, where the parties have no special interest in the subject-matter; at any rate, where the subject-matter of the wager has a ten-



(Wagers upon elections.)

dency injurious to the interests of mankind, I have no doubt in saying, that it ought not to be sustained." 16 East 159. Le Blanc, J., said, "it has been often lamented that actions upon idle wagers should ever have been sustained in courts of justice; the practice seems to have prevailed, before that full consideration of the subject which has been had in modern times; but the frequent discussion of it, in these times, has so far satisfied the minds of most lawyers, that they are now agreed, that objections would have lain in many cases of wagers, that have formerly been maintained without noticing such objections; and it is now clearly settled, that the subject-matter of a wager must, at least, be perfectly innocent in itself, and must not tend to immorality or impolicy." Ibid. 161. Bayley, J., said, "the discussion which has been had of this case, has strongly illustrated the inconvenience of countenancing idle wagers in courts of justice; it occupies the time of the court, and diverts their attention from causes of real interest and concern to the suitors; and I think it would be a good rule, to postpone the trial of every action upon idle wagers, until the court had nothing else to do." Ibid. 162.

In *Henkin v. Guerss*, 12 East 247, the court expressed itself with unusual warmth on the subject; the bet was, whether a person could be lawfully held to bail, on a special original, for a debt under £40; there was nothing immoral in this; but what said the court? "Courts of justice were constituted for the purpose of deciding really existing questions of right between the parties; and were not bound to answer whatever impertinent questions persons thought proper to ask them, in the form of an action upon a wager; and although there was nothing immoral in the subject of this wager, they considered it an extremely impudent attempt to compel the court to give an opinion upon an abstract question of law, not arising out of pre-existing circumstances in which the parties had an interest." The court refused to hear the case. So, a

(Wagers upon elections.)

cause coming on to be tried before Lord Loughborough, in which the plaintiff declared upon a wager, "whether there are more ways than six, of nicking seven on the dice, allowing seven to be the main, and eleven a nick to seven," his lordship ordered it to be struck out of the paper; and the court of common pleas afterwards refused leave to restore it. *Brown v. Leeson*, 2 H. Bl. 43. So too, in *Squires v. Whisken*, 3 Camp. 140, which was upon a wager on a cock-fight, not prohibited by any statute, Lord Ellenborough refused to hear the case; first, because "cock-fighting must be considered a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice;" and secondly, because such wagers "tend to the degradation of courts of justice; for it was impossible to be engaged in ludicrous inquiries of this sort, consistently with that dignity, which it is essential to the public welfare, that a court of justice should always preserve."

These cases show the strong leaning of the courts in Great Britain, at the present day, to get rid of a rule transmitted to them through the inadvertence of their predecessors, and which has trammelled and fettered them, whenever they have been called upon to apply it. Their universal regret, with the various reasons for it, has satisfied my mind, that when the courts entertained actions upon wagers, which were unconnected with the ends of justice, they mistook the common law; for it does appear to be an extraordinary proposition, that courts of justice, established to determine on the applicability of the law to the acts and contracts of mankind, should be at the disposal of all persons who may think proper to submit to them the decision of idle bets upon indifferent subjects, and thereby also be made to sanction the practice of gambling. This point has never yet been ruled in this state, that I am aware of, and I shall not be the first to recognise such a doctrine; I take the rule of law to be, that no action for a wager can be maintained, unless it be

(Wagers upon elections.)

upon a feigned issue, ordered by a court, in furtherance of justice.

But even according to the law now prevalent in England, the present action cannot be maintained. The subject-matter of the bet must be perfectly innocent, and not tend to immorality or impolicy; to this all the English judges agree. The present wager is between two citizens of this state, on the event of the late presidential election; they had, before betting, both voted for members of the state legislature, whose office it was to choose the electors of president; but such choice had not yet been made. Had the bet been made prior to the election for members of that legislature, it would have been within the principle of *Allen v. Hearn*, 1 T. R. 56, where it was decided, that a wager between two voters, with respect to the election of a member of parliament, laid before the poll began, was illegal; because it created a pecuniary influence interfering with the voter's giving his vote freely, and affording a color for bribery. This, to be sure, implies that the influence should be such as would affect the voter himself, and not a third person merely; and such was the principle of the case of *Jones v. Randall*, Cowp. 37; but I take the general principle; that the wager *must be innocent, and have no improper tendency, however remote*. Can that be said in the present case? It gives each bettor a pecuniary, and therefore, improper interest in the election or defeat of a presidential candidate; it is true, that neither of the parties had a voice in it; but the country has a deep interest in preserving the purity of this election, and whatever, gives a citizen an improper motive to promote or obstruct the elevation of a candidate, tends to affect that purity. "No matter," to use the language of Lord Ellenborough, in *Gilbert v. Sykes*, "how infinitely remote the probability of any mischief in fact arising from it, it is deemed void, on account of its tendency." 16 East 158.

It is admitted by the plaintiff's counsel, that if the bet had been made by a member of the legislature, who had a

(Wagers upon elections.)

vote in the choice of electors, it would have been void; but let it only be imagined, that a large body of citizens should create in themselves a deep pecuniary interest in such a question, and it cannot be denied, that its *tendency* would be, to influence that small body of voters in their choice of electors; and indeed, the electors themselves might be imperceptibly affected by it. But another mischievous tendency of this practice, is the aggravation of party spirit; this, at all times of election, runs high enough already for the safety of the public peace; add to it the *stimulus* of a high wager, and you throw gunpowder into the flames; you will create hostilities and feuds of the most deadly character, and set up a man's interest against his public virtue. But it is needless to dwell on this topic; for no one can deny, that whatever tends to excite one class of citizens violently against another, at elections in this country, has an impolitic tendency, and should be avoided; and it seems to me, that giving a pecuniary loss or gain in the event, would be the readiest mode of raising this excitement.

In New York, it has been decided, in the case of *Bunn v. Riker*, 4 Johns. 426, and *Lansing v. Lansing*, 8 Johns. 454, that a bet involving an inquiry into the validity of the election of governor of the state, whether made before or after the closing of the poll, was void, on principles of public policy. And in *Vischer v. Yates*, 11 Johns. 28, Kent, C. J., after recognising the authority of these cases, said, "and when we consider the importance of popular elections to the constitution and liberties of this country, and that the value of the right depends upon the independence, moderation, discretion and purity with which it is exercised, we cannot but be disposed to cherish a decision, which declares gambling upon such elections to be illegal, as being founded in the clearest and most incontestable principles of public policy." It has also been decided in Pennsylvania, in the case of *Smyth v. McMasters*, 2 P. A. Browne 182, that "wagers upon the result of an election,

(Wagers upon elections.)

whether laid before or after the election, are illegal and void." Not having the book, but taking this note from Wharton's Digest, I do not know the nature of the election spoken of, nor by whom the bet was made.

Upon every view, then, which I have been able to take of this case, I am of opinion, that the wager is illegal, and that the action ought not to be maintained. The case is, therefore, stricken from the docket.

The plaintiff moved the court of appeals, that the case might be ordered to be restored to the docket.

*Axson*, for the motion, cited *Hasket v. Wootan*, 1 N. & M. 180; *Allen v. Hearn*, 1 T. R. 56; *Jones v. Randall*, Cowp. 37; and the dissenting opinion of Spencer, J., in *Bunn v. Riker*, 4 Johns. 437.

*Seymour*, contra.

COLCOCK, J., delivered the opinion of the court. We concur with the Recorder, in the sound and elaborate view which he has taken of the doctrine on this subject, as applicable to the present case; and the motion is, therefore, dismissed.

Motion refused.

---

It was decided, in New York, as early as 1809, that a wager between two electors, upon the result of the gubernatorial election, was void, on the ground of public policy, and that no action was maintainable thereon. *Bunn v. Riker*, 4 Johns. 426. This was followed, in that state, by *Lansing v. Lansing*, 8 Johns. 454, where it was determined that, even if the loser had given his negotiable note for the amount of the wager, the invalidity of the contract was a good defence as against an endorsee of the note. And in *Vischer v. Yates*, 11 Johns. 23, it was held by Kent, C. J., that although the amount of the bet had been deposited with a stakeholder, an action would lie against him, by the loser, to re-

(Wagers upon elections.)

cover back the amount of his deposit. In Pennsylvania, the same point was ruled in *Smyth v. McMasters*, 2 P. A. Browne 182, where it was decided, that a wager on the result of the election for governor was illegal and void; in that case it was said by Rush, P. J., that the elector "having divested himself of his *own* independence, was a fit instrument of corruption to fasten the chains of slavery upon all around him." And now, under the statute of that state, all contracts or promises depending upon a bet on the result of an election, are null and void. *Lloyd v. Leisenring*, 7 Watts 294; *Wagonseller v. Snyder*, Ibid. 343. The law is the same in California, where it is held, that wagers upon the result of elections are against public policy, and therefore void. *Johnston v. Russell*, 37 Cal. 670. So also, in the state of Kansas, *Reynolds v. McKinney*, 4 Kansas 94; *Jennings v. Reynolds*, Ibid. 110; and in Illinois, *Gregory v. King*, 3 Chicago Leg. News 349.

Different opinions, however, exist as to the effect of the deposit of a wager in the hands of a stakeholder, upon the rights of the parties. In Pennsylvania, by statute, money bet on an election is forfeited to the use of the overseers of the poor, who may recover the amount, by action, either from the stakeholder, or from the winning party, if it have been paid over, provided suit be brought within two years. *Purd. Dig.* 380. But if the overseers do not sue within the two years, then, the losing party may recover back his money from the stakeholder, if it still remain in the hands of the latter. *Forscht v. Green*, 53 Penn. St. R. 138. If, however, the money have been paid over to the winner, it cannot be recovered back by the loser, or attached by his creditors. *Speise v. McCoy*, 6 W. & S. 485. The statute does not avoid a loan made in another state for the purpose of betting upon the presidential election; such loan is recoverable in Pennsylvania. *Scott v. Duffy*, 14 Penn. St. R. 18. A notice to the stakeholder not to pay over money deposited in his hands upon an illegal wager, must come from the owner of the money. *Reichly v. Maclay*, 2 W. & S. 59. And a joint action will not lie by the depositors to recover back the same. *Mytinger v. Springer*, 3 W. & S. 405.

In California, money deposited with a stakeholder, may be recovered back, provided the wager be repudiated and a return of the money demanded, before the election has taken place, and the result become generally known, but not afterwards. *Johnston v. Russell*, 37 Cal. 670. Whilst in Kansas, the amount may be recovered back, or attached by a

(Wagers upon elections.)

creditor of the depositor, at any time before it is paid over. *Reynolds v. McKinney*, 4 Kansas 94; *Jennings v. Reynolds*, Ibid. 110. In Illinois, if a negotiable note be given for an illegal wager, the illegality of the consideration, is no defence in a suit by an endorsee for value. *Adams v. Wooldridge*, 4 Ill. 255; *Shirley v. Howard*, 3 Chicago Leg. News 230. And see *Gregory v. King*, Ibid. 349.

A wager as to who will be the president of the United States, is a wager upon the result of an election within the state, because the election in the state contributes to the result, and the election of presidential electors is meant, when the wager is made upon the election of president. *Commonwealth v. Davis*, 2 Leg. & Ins. Rep. 18. For the form of an indictment for betting on an election, see *Sherban v. Commonwealth*, 8 Watts 212.





## A P P E N D I X .

---

### CUMULATIVE VOTING.

THE following remarks on cumulative voting, a subject which is attracting much attention, both in England and America, are taken from a report made to the senate of the United States, on the 2d March 1869, by the Hon. Charles R. Buckalew, from a select committee on representative reform, and from a speech of the same learned gentleman delivered in Philadelphia on the 19th November 1867.

Ours is said to be a government of the people, meaning, by that term, the whole electoral body with whom the right of suffrage is lodged by our constitution. The people, considered in this sense, are said to rule themselves, and our system is, therefore, described as one of self-government; those who are bound by the laws are to enact them. Power is, in the first instance, exerted by them, and obedience yielded afterwards; all rests upon their voluntary assent and upon their free action. But, as it is impossible, that the whole mass of the political community should assemble together, for the purpose of enacting or agreeing upon those rules of conduct which are to bind the citizen, and as it would be impossible for such an enormous body, even if convened, to act with convenience, or to act at all, we, like the people of other countries, have resorted to what is known as the representative system.

(Cumulative voting.)

From the impossibility of convening ourselves together to determine those great questions which pertain to the political and social bodies, and about which government is employed, we have determined to select from among ourselves a certain number of persons, with whom shall be lodged all our powers connected with legislation and with government, and whatsoever they shall determine shall be to us, and to all men within our borders, the law of individual conduct. In carrying on this system of representative government, the manner in which the agents of the people shall be selected, becomes in the highest degree important. Although by our theory, although by our fundamental principle of self-government, all the people are to be represented in the making of laws, and in the administration of government, in point of fact, we have not attained to this result. We have fallen short of it in our arrangements, and hence it is, that men of intelligence and sagacity, driven to their conclusions by thorough examination and full inquiry, have been compelled to declare that our system is imperfect, and imperfect to such an extent, that the quality of our government is affected and many pernicious things have place in its administration.

Instead of there being, under the representative system, as it is known among us, a representation of the entire electoral body, of all the individuals who compose it, there is, in fact, a representation of a part only. In other words, representation, instead of being complete and co-extensive with all those who are to be represented, and who are to be bound by the action of the government, is partial and restricted to a part only of the political body. In the infancy or in the early stages of a government, an imperfection of this kind may be permitted or overlooked. The affairs of society, when they are not complicated, before the community has become rich, before its affairs, social and political, become involved and intricate, may admit of very rude and imperfect arrangements; and yet

(Cumulative voting.)

the people may be well governed, the laws may be just and wholesome, and administered in the proper spirit and with complete success. But as wealth accumulates, as population becomes dense, and great cities grow up, as vices are spread through the social body, and as widely-extended and complicated political action becomes necessary, those earlier and simpler arrangements (imperfect always), become positively pernicious and hurtful; and the necessity arises for their correction, and that the system of government shall be purified and invigorated by amendment.

In popular elections which are held or taken under the majority, or rather under the plurality rule (which ordinarily amounts to the same thing), the smaller number of voices which are spoken in the election of representatives are stricken from the count. When the officers charged with the duty of collecting the voices of the people come to make up the count and declare the result, they strike from the poll or the return all those who, when numbered, are the smaller quantity or the smaller political force. Then, after representatives selected in this manner by a majority merely (by a part of the community), are convened together, when they come to act in the business of government—to enact laws—they again act by a similar rule; the majority in the representative body pronounce the opinion and decree of that body, and what they pronounce becomes the law, binding upon all the people. Now, what is observable in this statement of facts? In the first place, in selecting representatives, we strike off a part of the political body; then again, in representative action, we strike off the minority of the representative body, who represent another portion or mass of the popular electors; and the result is, that our laws may be made by men who represent a minority of the people who are to be bound by the laws so made. A representative majority may not be, in point of fact, and often is not, a representative of the majority of the people. Is it not then evi-

(Cumulative voting.)

dent that, instead of our representative system being what we originally intended it to be, and what we had supposed it would be, it is, in its practical action, characterized by imperfections which must arrest universal attention, when the facts are examined, and provoke a cry for some measure of amendment and reform.

Formerly, when elections of representatives in congress were had by general ticket, a great inconvenience resulted, which became at last offensive and intolerable; for a political majority in a state, organized as a party, and casting its votes under a majority or plurality rule, secured, in ordinary cases, the entire representation from the state, and the minority were wholly excluded from representation. To avoid this inconvenience and evil, which had become general throughout the country, congress interposed and, by statute, required the states to select their representatives by single districts, that is, to divide their territory into districts, each of which should elect one member. This contrivance, dictated by congressional power, ameliorated our electoral system, mitigated the evil of which general complaint had been made, and was an unquestionable advance in the art of government amongst us. But, retaining the majority or plurality rule for elections, and restricting the power and free action of the elector, it was imperfect in its design, and has been unsatisfactory in practice; it has not secured fair representation of political interests, and it has continued in existence, in a somewhat mitigated form, the evils of the plan of election by general ticket, which it superseded; still, one body of organized electors vote down another; electoral corruption is not effectually checked; and the general result is, unfair representation of political interests in the popular house of congress.

Besides, the single district plan has called into existence inconveniences peculiar to itself, and which did not attach to the former plans. It excludes from congress men of ability and merit, whose election was possible before,

(Cumulative voting.)

and thus exerts a baneful influence upon the constitution of the house. Two causes operate to this end; in the first place, no man who adheres to a minority party, in any particular district, can be returned; and next, great rapidity of change is produced by fluctuation of party power in the districts. Again, the single district system gives rise to gerrymandering in the states, in the formation of districts; single districts will almost always be unfairly made; they will be formed in the interest of party, and to secure an unjust measure of power to their authors, and it may be expected that each successive district apportionment will be more unjust than its predecessor. Parties will retaliate upon each other, whenever possible; the disfranchisement suffered, through one decade, by a political party, may be repeated upon it in the next, with increased severity, but if it shall happen to have power in the legislature, when the new apportionment for the state is to be made, it will take signal vengeance for its wrongs, and in its turn indulge in the luxury of persecution.

The manner in which the right of suffrage shall be exercised, always a question of high importance, is one of difficulty also. It has been regulated in various ways in our states and in foreign countries, but must be considered, in many respects, as still open to debate. We have pretty generally adopted the vote by secret ballot, for popular elections, but whether votes be given by secret or open ballot, a question will remain, as to the manner in which they shall be bestowed upon or distributed among candidates. Where but one representative, or other official, is to be chosen by a constituency, it is readily understood, that a single vote is to be given by each elector to the candidate of his choice; and such is the uniform regulation. But where more than one person is to be chosen by a constituency, the manner of bestowing votes upon candidates, is a question of more difficulty, and various regulations have been made or proposed concerning it. By the general-ticket plan of distributive voting, the

(Cumulative voting.)

elector has assigned to him a number of votes equal to the whole number of persons to be chosen, and is authorized to bestow them singly upon a like number of candidates; upon this plan, presidential electors are chosen in all the states, except Florida. By the single district plan, the general constituency is divided into parts, by territorial lines, and each part constituted a sub-constituency, to vote separately and choose one person; the voter casts a single vote for his candidate, and has no participation in the action of the general constituency, beyond the giving of his district vote; upon this plan, prescribed by statute, representatives in congress are now chosen.

The limited vote obtains, where the voter is forbidden to vote for the whole number of persons to be chosen by the constituency, but is authorized to give single votes to each of a less number, or a single vote to one. Upon this plan, inspectors of election are chosen in Pennsylvania; each elector votes for one inspector, and yet two are chosen; here is a limitation upon the voter; instead of voting for both, the law says, that he shall vote but for one. What is the practical result throughout the state, under this law? Why, that one inspector belongs to the majority party, in each election district, and the other belongs to an opposing one; in other words, both the parties into which our political society is ordinarily divided, are represented in the election boards. Thus we secure representation of the entire mass of the electors, and yet we secure it by a limitation upon the votes of individual electors. What has been the practical result of this arrangement, which is found in the state election law of 1839? has the result been good or bad? Why, there is not an intelligent, honorable citizen in the commonwealth, who would not cry "shame," if that law were repealed. It is a law by which elections are kept comparatively pure, by which fraud is prevented, and fairness is secured to the citizen in polling his vote. A notable instance of the application of the limited vote is found in

## (Cumulative voting.)

the act of the British parliament, passed in 1867, whereby it is provided that "at a contested election for any county or borough represented by three members, no person should vote for more than two candidates," and henceforth, in the election of members of the popular house of parliament, where a constituency select three members, two will be given to the majority, and one to the minority of the electors, assuming that the latter constitute so large a mass as one-third of the whole number.

The cumulative vote is the concentration of two or more votes upon one candidate, or upon each of a greater number; it may obtain whenever the voter has assigned to him more votes than one, and is permitted to cast them otherwise than singly among candidates. The unrestricted or free vote obtains where the voter has assigned to him a number of votes equal to the whole number of persons to be chosen by the constituency, and is permitted to cast them according to his own discretion and choice, without legal restraint; in such cases, he may bestow them all upon one candidate, or cumulate them upon more candidates than one, or cast a part of them singly, and a part of them upon the principle of cumulation, precisely as his judgment may direct him and the possibilities of the case may permit.

The plan of cumulative voting was, in the first instance, proposed, explained and advocated by James Garth Marshall, a subject of Great Britain; and by his proposition and his advocacy of it, he has given his name to the political history of his country, and to the political history of representative institutions everywhere, in future times; for no one previously had mastered this subject with such grasp; no one had looked into it with such intuitive perception of all its characteristics, and was able to strike precisely the point where reform could be most safely and effectually introduced. It is preferable, infinitely preferable, to all propositions for securing the

(Cumulative voting.)

representation of all interests in society, by any limitation upon the elector's vote.

This system or plan of cumulative voting has been endorsed by John Stuart Mill, in his work on Parliamentary Reform, and in that on Representative Government, and since ably supported by him in the House of Commons. It has been recommended also by Earl Grey, in his work on Parliamentary Reform; it was proposed, during the consideration of the reform bill in the House of Commons, by Mr. Lowe, on the 5th July 1867, and after debate, received the very respectable support of 173 votes. It is beginning to attract, in this country, that degree of attention which it merits, and which is naturally provoked by the inquiry which has taken place abroad.

Mr. Mill, in his work on Representative Government, p. 59, after speaking of the advantages of the system of cumulative voting, says, "the natural tendency of representative government, as of modern civilization, is toward collective mediocrity; and this tendency is increased by all reductions and extensions of the franchise, the effect being to place the principal power in the hands of classes more and more below the highest level of instruction in the community; but, though the superior intellects and characters will necessarily be outnumbered, it makes a great difference whether or not they are heard; in the false democracy which, instead of giving representation to all, gives it only to the local majorities, the voice of the instructed minority may have no organs at all in the representative body. In the American democracy, which is constructed on this faulty model, the highly-cultivated members of the community, except such of them as are willing to sacrifice their own opinions and modes of judgment, and become the servile mouth-pieces of their inferiors in knowledge, do not even offer themselves for congress or the state legislatures, so certain is it, that they would have no chance of being returned."

It will be seen, that the unrestricted or free vote is more



## (Cumulative voting.)

comprehensive and flexible than the others, and that it includes many of their features, and may be used to accomplish their objects. It involves or includes the vote by general ticket, without the restriction that but one vote shall, in any case, be given to a candidate; it may be used to accomplish the purposes of the limited vote, and of single district voting, in a just, effectual and popular manner; and it includes completely the cumulative vote, with which it is, in character, closely allied. In brief, it combines the advantages of other plans, without their imperfections, while it is not open to any strong objection peculiar to itself. The ingredient, however, of greatest value and importance contained in it, and the one particularly fitted to regenerate and give credit to elections, is, the principle of the concentration of votes. In fact, for practical purposes, in dissertation or argument upon the question of electoral reform, the terms "cumulative vote" and "free vote" may be interchangeably used (though the latter is most appropriate and accurate), to indicate a plan which commonly involves distribution as well as concentration of votes, and sometimes even the giving of single votes to particular candidates.

The first consideration to be taken into account is, the simplicity and convenience of this plan of reform. It is easily understood, convenient of application, and will readily adapt itself to all new or changed conditions of political society; it is self-adjusting, and requires no law whatever to enforce it or afford it a sanction, beyond the act which shall simply call it into existence. The number of representatives to which a state shall be entitled being first ascertained, under the rule of distribution contained in the constitution, the law will simply declare that each voter of the state shall have as many votes as there are representatives to be chosen from his state, and at that point will stop, leaving the voter perfectly free to cast his votes according to his own judgment and discretion. The voter then may exercise his right according to any of the

## (Cumulative voting.)

plans relating to the distribution or concentration of votes, which have heretofore been the subject of discussion, including those which have and those which have not been prescribed by legal enactment. But inasmuch as our political communities will always be divided into political parties (or so long as free institutions remain to us), it must happen, that the voter will exercise his right with direct reference to his party associations—to the interests of the party to which he shall belong. He will vote (as he votes now) as a party man, and for candidates who have been selected by some form of nomination, by some agreement or concert of action among men of common views and common interests. The inevitable result will be, that political parties and the voters who compose them, will obtain fair and complete representation, by distributing or concentrating their votes, in such manner as to secure it, and nothing can be more certain, than that they will be better judges of their own interests than the law-maker possibly can be; for they will act with a full knowledge of all the facts which pertain to an election, of the relative strength of parties at the time, the probable amount of the aggregate vote to be polled, and generally, of the effect of their voting in any particular manner.

Of these matters the law-maker must be profoundly ignorant, or must conjecture or assume them at random; he cannot foreknow the future, nor adapt his arrangements to the ever-changing conditions of political society. It is for this reason, that imperfection will always attach to the limited vote, as a general plan to be applied to popular elections. The law-maker cannot know that his arbitrary limitation will operate justly, and secure his object at some future time. If he could know the exact relative strength of parties, in future years, he might apply his limitation to a constituency, with confidence; adjusting it to the facts, he could obtain a proper result; as this cannot be, the limited vote can be but partially applied to elections, and must, in most cases, be unsatisfactory; it

(Cumulative voting.)

has rarely been applied to constituencies selecting more than three representatives, and can never be accepted as a plan for extensive use and application. The unrestricted or free vote, however, is not open to these objections; it will adjust itself to all cases, and it will have the most important and effectual sanction; for it will be put under the guardianship of party interest, always active and energetic, which will give it direction and complete effect to the full and just representation of the people.

The unrestricted or free vote is in strict conformity with democratic principles, and realizes more perfectly our ideas of popular government; for, by it, the whole mass of electors are brought into direct relations with government, and particularly with that department or branch of government (the principal one in power, if not in dignity) which makes the laws. All will participate really in choosing representatives, and all will be represented in fact. Now, the beaten body of electors choose nothing, unless it be mortification, and are not represented at all; for the theory that they are represented by the successful candidates against whom they have voted—that those candidates, when installed in office, represent them—is plainly false. An elected official represents the opinions and the will of those who choose him, and not those who oppose his election; as to the latter, he is an antagonist and not a representative; for his opinions are opposed to theirs, and their will he will not execute. And this must always be the case where political parties act upon elections, and a majority or plurality rule assigns to one party the whole representation of the constituency. Our present system of representation is, therefore, essentially partial and imperfect, and our great object in reforming it must be, to make it full and complete; if we cannot secure this object perfectly, it will be our duty to approach it as nearly as possible. Inasmuch as by extending to the elector that freedom of choice and of selection which the law has heretofore forbidden, we can strike from our system of

(Cumulative voting.)

representative elections, almost entirely, the element of disfranchisement, and bring the whole electoral body into direct and useful relations with the representative body, we may congratulate ourselves, that this reform, while it will be rich and fruitful of results, in the purification of elections, in imparting energy and wisdom to government, and contentment to the people, will also be strictly republican in character, and democratic in principle, and will apply, more perfectly than ever before, those ideas of self-government which inspired our ancestors, when they established our political institutions.

The unrestricted or free vote should be permitted because it is just. That this quality pertains to it in a high degree, and constitutes one of its main characteristics, is beyond question. It gives an equal voice to every elector of a state, secures the elector from the peril of utter disfranchisement, and affords to him also that freedom of choice which is indispensable to his complete and useful exercise of his right; a vote at any point or place in the state is precisely as valuable and as important as at any other point or place; location of the voter is immaterial, as affecting his right, or his consequence in the electoral body, and no preference in privilege or power is given, or advantage allowed, to one elector over another. Besides (and this is the great consideration), any material disfranchisement of electors is rendered almost impossible; for every political interest of any considerable magnitude in a state, will have the complete opportunity afforded it of concentrating its vote upon a proper number of candidates, and those candidates will be chosen, not merely because they have more votes than other candidates (as under our present system), but because they are the recipients of an adequate support; one mass of voters will not vote down, defeat or disfranchise another; one candidate will not beat another, in the ordinary sense of that expression. The full comprehension of this point may require reflection, by those to whom it is new, but no reflection is necessary

(Cumulative voting.)

to perceive the justice of a plan which will substantially strike disfranchisement from our electoral system. Lastly, it is but just, that the elector should have a greater freedom of choice than is now allowed him, that his judgment should have freer action, that he should enjoy all possible facilities for performing his duty to his country, in exercising his right of suffrage. At present, he is hedged about and constrained by legal regulations which, while wholly unnecessary to the public order and peace, cripple and impede him in the performance of his duty. He is held responsible for the character and action of the government, for, in theory, he controls it by his vote, and yet he does not possess all those facilities and rights, the possession of which will justify that responsibility, and enable him to discharge all its obligations.

In the matter of selecting representatives from his state to congress, perhaps, the most important of all electoral operations known in our country, he is allowed to participate in the selection of but one out of the whole number; the state may be entitled to six, to twelve or to twenty representatives, but the judgment of the elector can be exercised upon the choice of one only; as to all the rest, he is excluded from taking part in their selection. Besides, his choice of a single representative must be exercised within and for a particular district, arbitrarily established by law, with such boundaries, population, interests and political complexion as may happen to be convenient or agreeable to a majority in the legislature of the state; and practically, he must select his candidate from among the men of the district and is excluded from all choice beyond it. When to all this we add, that the elections held in single districts are necessarily subjected to the majority or plurality rule, which very commonly renders a large part of the votes cast unavailing for the purpose for which they are given, we have the case fully presented as one of inconvenience and hardship upon the elector. The law has been busy, where it should have been inactive,

(Cumulative voting.)

and the voter is bound by inconvenient and injurious restrictions, which he can neither evade nor defy. It is time that the hand of power be lifted from the citizen, and he be permitted to perform his electoral duties with all possible freedom. The justice of the proposed reform is, therefore, evident; it extends popular power upon a principle of equality, limits disfranchisement, and provides the voter with the necessary facilities for the exercise of his right.

The unrestricted or free vote will greatly check corruption at elections; it will take away the motive to corrupt, and thus strike an effectual blow at the source of a great evil. Now, money and patronage are usually expended upon elections, to secure a majority or plurality vote for one or more candidates, over one or more other candidates, and are directed and applied to the comparatively small number of electors in the constituency who hold the balance of power between parties; those persons being bought or seduced, victory is secured. The importation of voters into a state or district, or their fraudulent creation within it, is with a like object. And such corrupt influence or practice, when resorted to by one party, provokes like conduct in an opposing one, until both become tainted with guilt, and unfitted for vindicating the purity of elections. This evil grows in magnitude, yearly, and it will continue to increase, until those motives of interest which produce it shall be weakened or destroyed.

A new right to the elector, whether in the form of the free or cumulative vote, or of personal representation,\* or a new protection to him in the form of the limited vote, will check corruption; but of these remedies, the first is most practicable and effectual. The limited vote cannot have extensive application, and is but a rude contrivance. Personal representation is a scheme of great theoretical

\* For an account of the theory of personal representation, see Mill on Representative Government, p. 56; and Sterne on Representative Government and Personal Representation.

(Cumulative voting.)

merit; it has been tried partially in Denmark, and has received elaborate vindication from authors of distinction in England, in Switzerland and in France; but it may be put aside from the present discussion, because it is comparatively intricate in plan and cumbrous in detail, because it assails party organization, and because some of its most important effects cannot be distinctly foreseen; it is so radical in character, so revolutionary in its probable effects, that prudence would dictate, it should be very deliberately considered, and subjected to local experiment and trial, before it be proposed for adoption, upon a grand scale, by the government of the United States.

But why will the cumulative or unrestricted vote check corruption? It will have this effect—it will operate efficiently to this end—because it will render any ordinary effort of corruption useless and unavailing. The corruption of voters will not change the result of an election; it will elect no candidate and defeat none in contested states or districts, unless, indeed, it be carried on and carried out upon a gigantic scale, beyond any ordinary experience of the past or probable occurrence of the future. An average or common ratio of votes for a representative in congress, taking the whole country together, is now 25,000, and it will be much greater in future times. Assume then, that 600,000 votes are to be cast in Pennsylvania, at an election, of which each party has one-half, and that twenty-four representatives are to be chosen; this is a supposition very nearly conformed to actual numbers in that state; now, it is evident, that either political party, by resorting to the cumulative vote, can elect twelve representatives, and thus secure to itself exact and just representation, and no art nor effort can prevent it. But suppose further, that corruption shall assail the electors, and that some thousands of votes shall be changed thereby, or that, in the interest of one of the parties, so many as 10,000 or 20,000 voters shall be imported into the state, or

(Cumulative voting.)

be fraudulently created or personated within it, in either case, no effect will be produced; the result will be unchanged; in short, in the case supposed, a fraudulent *increase* of its vote (and of the total vote) by a party, to the extent of 20,000, will not give to it any advantage, nor will its corrupt acquisition of 5000 or 10,000 votes from the opposite party. It follows, that corruption will, in no ordinary case, be resorted to; it will be effectually discouraged and prevented, and even in the extreme case of the corruption of a large number of voters in a state, the resulting evil will be reduced to its minimum.

What has been said concerning the choice of representatives, will apply with equal if not greater force, to the choice of presidential electors. If the representative presidential electors were chosen in the several states (save those which have but one), upon the plan of the cumulative vote, there would be, as to them, due representation of the people in the electoral colleges, and the elections for choosing them would receive a much needed purification; millions, now expended upon those elections, would be kept out of the hands of political agents, and be applied to better and nobler uses.

That freedom of the vote will have the effect claimed for it, will more clearly appear from considering the manner in which the present plan of elections operates to invite or produce corruption; by considering the evil which exists, we will be better able to judge the merits of the remedy proposed. Popular elections in the states for federal or national purposes, are, either by a general ticket for the whole state, or by a single ticket in district divisions; as before stated, the former obtains in the choice of presidential electors, the latter, in the choice of representatives to congress; but to both is applied the plurality rule, and a struggle invited between candidates and parties for preponderance of vote. Whichever can be made to outnumber an opposition upon the return, will win the whole result, and wield the entire power of the



(Cumulative voting.)

constituency in an electoral college, or in congress; antagonism is thus made an essential element of the proceeding, and the result presents to us the spectacle of victor and vanquished, the former crowned with power and exultant in its strength, the latter humiliated and powerless. And it is important to observe, that the successful party does not obtain merely a power proportioned to its vote, but obtains the whole power of the constituency; the whole vote cast against it or withheld from it, is virtually counted to it and added to its true vote. An issue thus made up for popular elections, must be one portentous of evil; and so far as it is unnecessary to secure popular representation, must be denounced, as plainly unjust as well as injurious.

The free vote will be a guarantee of peace to our country, because it will exclude many causes of discord and complaint, and will always secure to the friends of peace and union, a just measure of political power. The absence of this vote in the states of the south, when rebellion was plotted, and when open steps were taken to break up the union, was unfortunate, for it would have held the union men of those states together, and have given them voice in the electoral colleges and in congress. But they were fearfully overborne by the plurality rule of elections, and were swept onward by the course of events into impotency or open hostility to our cause; by that rule, they were largely deprived of representation in congress; by that rule, they were shut out from the electoral colleges; dispersed, disorganized, unrepresented, without due voice or power, they could interpose no effectual resistance to secession and civil war; their leaders were struck down at unjust elections, and could not speak nor act for them in their own states nor in the capitol of the nation. By facts well known to us, we are assured, that the leaders of revolt, with much difficulty, carried their states with them; even in Georgia, the empire state of the south, the scale was almost bal-

(Cumulative voting.)

anced, for a time, between patriotism and dishonor; and in most of those states, it required all the machinery and influence of a vicious electoral system, to organize the war against us, and hold those communities compactly as our foes.

In those same states, the free vote will now allay antagonism of race, and will substitute therefor the rivalry of parties formed with reference to the policy of the general government. The tendency of parties is to form upon national issues and not upon state ones, and this tendency will operate more strongly, if causes of offence between the races shall be removed or lessened. And what can accomplish this more perfectly than the free vote? for, under it, one race cannot vote down and disfranchise the other; each can obtain its due share of power, without injustice to the other, and there will be no strong and constant motive, as now, to struggle for the mastery. This fact (the importance of which cannot be over-estimated) will allay animosity and prevent conflict; and because the free vote will have this certain effect, it will nationalize parties in the south, and will be to the whole country an invaluable guarantee of order and peace. In extending suffrage largely, in extending it to include many hundreds of thousands of voters of another race than our own, it becomes us to look to our electoral machinery, and to amend it in those parts which have been found defective, or which do not seem well adapted to the new strain to be put upon it. Unquestionably, there is a large mass of honest opinion in the country, opposed to negro suffrage, and many of those who support it in congress and out of congress, put their support on the ground of necessity—upon the ground that, in order to secure the fruits of emancipation, it is necessary, that the emancipated be armed with the power of self-defence. But all must agree, that this great experiment of extended suffrage, being once determined upon, should have a fair trial; that all the conditions proper to its success should, as far as

(Cumulative voting.)

possible, be established by the government; and those who sincerely believe that the experiment will have bad results, must approve a plan of voting which will certainly mitigate its possible evils. But the salutary effects of the free vote, as a guarantee of peace, though well illustrated by the southern states, will not be confined to them; everywhere it will decrease the violence of party contests, and create more amicable relations than now exist among our people.

The unrestricted or free vote will secure men of ability and experience in the house of representatives. It is believed, that changes are now too frequent in that house, and that the public interests suffer detriment from this cause. The constitution very properly assigns short terms of service to the members of the house; but frequency of election does not involve rapidity of change; popular power may be retained over the house, and yet the greater part of its members be continued, by re-election, for a considerable period of time; in other words, frequent elections and permanent membership are not incompatible. But in point of fact, the members of the house are frequently changed, so that members of less than four years' service always constitute a large majority, and it is a rare case that a member continues beyond a third term. Under such a system or practice of rapid change, the average character of the house for ability cannot be high; two and four year men can know but little of the business of government, can be but imperfectly qualified to curb abuses in the executive department, and to expose or comprehend the true character of most questions of domestic and foreign policy.

There are several reasons which account for frequent change in the membership of the house, of which the single-district system is chief; the fluctuation of party power is next in importance, but is intimately connected with the former. The single-district system has carried the idea of local representation to excess, and has produced

(Cumulative voting.)

a class of inconveniences peculiar to itself; the idea of assigning a representative, by law, to a special district within a state, is naturally supplemented by the idea of rotation in the representative privilege among the localities within the district; hence, very commonly, party nominations are made in turn to the several counties, parishes or other municipal divisions of the state, which renders necessary the frequent selection of new men for representative nomination; the claim of locality becomes more important, and is often more regarded, than the claims or fitness of candidates, in making party nominations, and this, although there be no diversity of interest among the people in the different parts of the district. The other cause which has been mentioned co-operates with this, though subordinate to it in effect; changes of party power in districts, where one party does not largely predominate over the other, are, at all times, likely to occur, and to defeat the member of the house from the district, although his own party may desire to continue him in the public service.

These causes of change would have but slight operation, if delegations from states were elected by general ticket; and would have still less, if they were elected upon the plan of the cumulative or free vote; and the general ticket system being quite inadmissible, for the reasons which apply to it, we are driven to the cumulative or free vote, as the practicable and effectual measure of reform. It will continue members of merit, in the house, for long periods of time, because it will relieve them, and those who support them, from the causes of change above mentioned. They can be re-elected, with certainty, so long as the party, whose representatives they are, desire their continuance in service, and it may be reasonably expected, that some men of distinction and intellectual power will always be found in the house, whose periods of service count by 20 or 30 years; they will be the great representatives of party, and will give lustre and power and use-

(Cumulative voting.)

fulness to the house, whilst they will be the objects of profound attachment and honest pride in the states they represent. Congress will become, much more than at present, a theatre of statesmanship, and a fit representative of a great people, whose extended territory, diverse populations, and varied interests demand great ability and wisdom in the enactment of laws. Our present system, admirably calculated to repress merit and lift mediocrity, will be supplanted by one which will produce precisely the opposite result.

At present, a member of the house, holding his seat insecurely, cannot devote himself to the public business with that zeal and confidence which his position demands. He is involved, all the time, in a contest for official existence, and his energies are thereby absorbed and wasted; if he have a just ambition to serve the people, he must repress rivals at home, overcome a rule of rotation in his district, and fortify himself against fluctuations of party power. It will be expected of him, that he distribute the patronage of the government to men who will be efficient in supporting his re-election; and thus appointments to office and government contracts must be his peculiar study, and their distribution a leading object of his labor; he must be liberal in his expenditure of money upon elections, to retain his popularity and place; and the more political contributions from abroad he can obtain to influence elections in his district, the more admired and the more secure he will be. In brief, his time and efforts, instead of being expended for the public, must be expended on personal objects, if he desire to remain, for any considerable time, a representative of the people. Undoubtedly, many of the best men of the country are deterred from entering upon a congressional career, continuance in which requires such sacrifices to an evil system, so much of unpleasant effort, attended with uncertainty and probable mortification.

But freedom to the elector has one special advantage,

(Cumulative voting.)

hitherto unnoticed, over single-district voting. Under the district system, a large part of the citizens of a state are absolutely barred from an election to congress; they cannot be chosen in districts where their party has not a preponderance of vote; the difference in strength between parties may be slight, but it will virtually constitute a rule of exclusion, which will be rigidly enforced. But the cumulative or free vote opens the doors of the people's house to any citizen of a state, whenever those who agree with him in opinion, in his state, will give him a competent support; they can elect him to congress regardless of state or district majorities. This is an advantage of immense value, if republican principles be true, and republican institutions worthy of being carried to their utmost limit of perfection, as fit and proper for the use and enjoyment of mankind.

Our states are well suited to the application of the free vote; the difficulties and obstacles which exist in Great Britain do not obtain with us. There are now only six states to which it will not apply as a plan for representative elections, to wit, Delaware, Florida, Kansas, Nebraska, Nevada and Oregon; they constitute the one-member states, and would be unaffected by the new plan. But from this class, Kansas will pass at the next apportionment, leaving but five states out of thirty-seven, to compose this class; and as they would select but five representatives, out of about 250 who will constitute the house, their influence upon general results would be unimportant, if not inappreciable. It is to be remarked also, that these states, in common with all the other states, might come under the operation of the free vote, if that vote should be applied to presidential elections, because each of them will be entitled to choose three electors.

The two-member states are Rhode Island and Minnesota, and both will probably change their position at the next apportionment of representatives; Rhode Island will fall off to one member, and Minnesota rise to three.

## (Cumulative voting.)

Other states, however, two or three in number, may take their place, and hence, it will be worth while to consider the position of two-member states, with reference to the plan of the free vote. It has been sometimes said, without due reflection, that the cumulative vote is not suited to elections where two persons are to be chosen by a constituency, because, if it have any practical effect, it will give equal representation to the majority and minority; but the frequent application of the limited vote to dual elections (as in the cases of inspectors of elections and jury commissioners in Pennsylvania), may cause us to pause, and examine this objection with some care, before we accept it as a sound one. Carefully examined, it may turn out to be more specious than solid, and we may further discover that, in the case of the representation of our states in the federal government, there is an important fact which bears upon this objection, and deprives it of any appearance even of strength or force. In the first place, let us test the objection, and illustrate its futility by a supposable case; take a constituency of 32,000 electors, 20,000 of whom are republicans, and 12,000 democrats, entitled to elect two members to congress; as there are 32,000 voters and two members to be chosen, the full ratio or number of votes for a member is 16,000; assign now one member to the republicans, and the just demand of 16,000 republican voters is complied with and exhausted; they can have no further claim to representation. What have we left? Why, on the one hand, 4000 republican voters, and on the other, 12,000 democrats; and the simple question for us to determine is, whether the 4000 or the 12,000 shall have the second member; the cumulative or the free vote will give that second member to the 12,000 democrats; unjust voting will give him to the 4000 republicans.

Where, then, a minority in a two-member constituency exceeds one-third of the whole number of voters therein, it does not seem unreasonable to assign to them the second

(Cumulative voting.)

member, and thus, in fact, an equality of representation with the majority. It is a case where complete or exact justice is impossible; there must be disfranchisement to some extent; but that disfranchisement should be reduced to its minimum, and made to press as lightly as may be upon the constituency. What, then, can be said as to two-member constituencies is this, that any rule of voting for them must, in the very nature of the case, be imperfect in result, but that the cumulative vote or an equivalent plan, applied even to them, will be one of reform and improvement.

But an important consideration remains to be mentioned; our states are represented in *both* houses of congress, and not merely in one; a fact which changes entirely the character of this question in the two-member states. In Great Britain, there is no representation of the people, or even of districts, in the upper house of parliament; compensation to a constituency for loss of political power in the house of commons cannot be obtained by them in the house of lords. With us the case is widely different; the political majority in a state will, ordinarily, have both the senators from the state; in other words, the whole representation of the state in the senate. If, then, in two-member states, they have but one-half the representation of the state in the house (as against a minority of one-third or upwards), the aggregate of their representation in congress, will still be many times over what it should be, upon any principle of justice or of numbers.

It is pretty generally agreed, that the cumulative or free vote is admirably suited to three-member constituencies; the states which now elect three members each, are Arkansas, California, New Hampshire, Vermont and West Virginia; in such states, the majority will always have two members, and the minority, if it exceed one-fourth the whole constituency, and one-third of the majority vote, can obtain the third. We cannot better illustrate the



## (Cumulative voting.)

scheme than by the case of Vermont; in that state, there are, in round numbers, 60,000 voters, of whom 40,000 are members of the republican party, and 20,000 of the democratic party; by law, that state is entitled to three representatives in congress. Now, what ought to take place? The majority should elect two representatives, having 40,000 votes, and the minority should elect one, having 20,000 votes; but can that be so, in point of fact, at present? If the electors of that state vote for three representatives, by general ticket, the majority would elect the whole three; if the state be divided up into single districts, it is a matter of chance (or rather, perhaps, a matter of honesty in the political majority of the legislature) how the result will be, whether all three districts will have majorities of the same political complexion or not. By cumulative voting, by authorizing the 20,000 minority electors of the state to give each three votes to one candidate, that candidate would receive 60,000 votes, and the majority could not defeat him; the majority, voting for two representatives, could elect them, but they could not elect the third. Suppose they attempt to vote for three candidates, they can only give each of them 40,000 votes, and the minority candidate has 60,000; if they attempt to vote for two, as they ought to do, that being the number they are entitled to, they can give them 60,000 votes each, the same number the minority candidate has; if they attempted to vote for one, they would give that one candidate 120,000; but, of course, they would not thus throw away their votes. The practical result would be, that the 40,000 majority electors in that state would vote for two candidates and elect them, and the 20,000 minority electors would vote for one and elect him.

Having exhausted the list of states which elect less than four members, we find that twenty-four remain; of these, Connecticut, South Carolina and Texas each elect four members, and the remainder, various numbers, up to New

(Cumulative voting.)

York which chooses thirty-one; they may be taken together in this examination, as an additional, though by far the most important class of states; they choose 218 out of the 243 members of the house. In this class, all the great states are before us, and all of secondary rank, challenging the wisdom of congress to reform and amend our political system, in some effectual manner; for our country has, in some respects, outgrown the system provided for us by our ancestors; new necessities press upon us, great evils afflict us, and it has become the duty of statesmen, not merely to administer or to carry on our plan of government, but to amend it also; and to this end, we are to invite and welcome the best thoughts of men, abroad and at home, upon political reform, and give them, as far as possible, application and practical effect. Now, there can be no question that, if parties in the great states obtain representation according to the number of their votes, one of the greatest possible reforms in a republican government will be secured. All the arguments heretofore mentioned apply to those states with special force, because they contribute the main body of members to the house, and a defective plan of election operates within them with extensive effect. As to them, reform will be most important and useful, and no reasonable effort should be spared in attempting to apply it.

We have, in fact, as to the great states, no point left for examination, except the single one of practicability. Will the free vote work, and work well, in the great states? Those who distrust popular intelligence and judgment may deny, whilst those who confide in the people will affirm the practicability of the plan. But there is one leading consideration which is decisive upon this question; it is, that where free action shall be permitted, each political party will pursue its own interests with activity, intelligence and zeal, and will inevitably obtain for itself its due share of representative power. Thus, where a party shall have one-third of the popular vote of the state,

(Cumulative voting.)

it will cumulate its vote upon one-third the number of representatives to be chosen; where parties are nearly equal in strength in a state, the weaker one will cumulate its vote upon one-half the number of persons to be chosen, or within one of that number; where a party has a small majority in a state, and particularly where it is increasing in numbers, it will cumulate its vote upon one or two more than one-half the number of candidates; and finally, in states with large delegations, a party with so small a vote as one-fourth or one-fifth the whole number, will cumulate its vote upon the small number of one, two, three or more representatives, according to the proportion which its vote shall bear to the total vote of the state. The due working of the plan is secured by the selfish interests with which it deals, and it is a matter of congratulation that, under it, the very efforts of parties to secure power for themselves, will result in justice, that is, in the division of power between them according to their respective numbers.

It is idle to say, that voting in the great states will be confused and uncertain; on the contrary, it will run according to party organization, at all times, and will adjust itself, naturally and inevitably, to all changes of opinion and organization in the political body; and as political parties constantly divide society into parts, the relative strength of which can, at any time, be approximately stated, there need be no uncertainty nor confusion in the polling of votes. Even in times of transition and change, when popular power is departing from one party and attaching itself to another, or when some third party takes ground upon a particular issue, or faction diverts a fragmentary vote from a great party, the amount of disturbance, and consequent uncertainty produced, will not be considerable, and can be readily estimated, for all practical purposes, in fixing the number of candidates which any party shall support. The merit or practicability of a rule of elections is not to be judged upon a supposition which

(Cumulative voting.)

is unlikely or exceptional; but even in the cases supposed, the elements of error and mistake will be reduced to their smallest possible quantity. Where the relative strength of parties is uncertain, that is, cannot be exactly known or estimated, or where the boundary of power between them is near the dividing line between ratios of representation, it will rarely happen, that a mistake will be made beyond the extent of one member, and the general result for the state will be but slightly disturbed.

The argument for reform may be summed up in a few words; by it we will obtain cheap elections, just representation, and contentment among the people; by it we will also secure able men in the people's house; by it our political system will be invigorated and purified; by it our country will "take a bond of the future," that our government shall be a blessing and not a curse; that our prosperity shall be enduring; that our free institutions "shall not perish from the face of the earth."

The state of Pennsylvania has recently legalized the cumulative or free vote in the election of members of town councils, by the acts of 4th March 1870 and 2d June 1871. *Purd. Dig.* 1647.

# INDEX.

---

## AFFIDAVIT

to petition, form of, 538.  
by whom administered, 544.

## AMENDMENT

to petition, when allowed, 337, 349, 353, 477.  
requisites of, 337, 349, 477.  
of answer, not granted during the hearing, 349, 477.  
not allowed by legislative committee, 350.  
not reviewable in appellate court, 538, 548.

## APPELLATE JURISDICTION

in contested election case, 538, 555-7.  
what questions may be reviewed, 538.

## ARREST

privilege of electors from, 277.  
and of election officers, 280.

## BALLOT

if the law require the election to be by, vivâ voce  
votes are void, 126.

## BILLS OF ATTAINDER

definition of, 37.  
nature of, 86.

## BILLS OF EXCEPTION

not allowed in contested election cases, 467.

## BILLS OF RIGHTS

nature of, 41.  
controlled by the constitution proper, 41.

**BOROUGH OFFICERS**

- right of, only determinable in quo warranto, 455
- vacancy, how filled, 455.
- nature of borough election, 457.

**BRIBERY**

- of elector, not an infamous crime, 134.

**BUCKSHOT WAR**

- history of the, 641.

**BY-LAWS**

- power to make, incident to corporations, 20.

**CANVASSERS**

- duties of, ministerial, 261, 300, 305-6, 434.
- have no judicial power, 300.
- returns, when conclusive on, 423.

**CASTING VOTE**

- right of returning officer to give, 286.

**CERTIFICATE**

- of election, not conclusive, on trial of contested election, 258, 320, 435.
- will not be enjoined, though founded on fraudulent returns, 314.
- can only be impeached by a direct proceeding, 314, 319.
- is *primâ facie* evidence of title, 632.

**CERTIORARI**

- effect of, in contested election case, 538, 577.
- what reviewable on, 538.

**CITIZENS**

- privileges and immunities of, 38.

**COMMISSION**

- construction of, 291.
- does not confer title, 302, 581.
- cannot be recalled, unless vacated by judicial decision, 573.
- use of, if issued pending a contest, will be enjoined, 573.
- effect of, 581.

## CONDITIONAL LAWS

when valid, 16.

## CONSIDERATION

when illegal, under the election laws, 612.

## CONSTITUTIONAL LAW

the people have no legislative power in their primary assemblies, 3, 24.

legislative power cannot be delegated, 3, 24.

laws that violate the principles of the constitution are not valid, 5, 25.

legislature cannot add to the constitutional qualifications of electors, 44, 50.

registry laws, not unconstitutional, 51.

no person can be made to suffer for a criminal offence, except by due process of law, 74.

construction of the federal constitution, 96.

taxes must be assessed on electors individually, 114.

disqualifications for office, 134.

meaning of provision that "elections shall be free and equal," 50, 63, 176.

electors cannot be authorized to vote outside the district of their residence, 214, 251.

construction of the state constitution, 231-4.

elector, by accepting office, may waive right of voting, 286.

congress may punish fraudulent registration at congressional election, 592.

## CONTESTED ELECTION

must be determined on the merits, 270-4.

courts in determining, act judicially, 466.

practice in cases of, 466-7.

jurisdiction to try, when exclusive, 656.

## CONVENTION

powers of, not defined, 29, 32.

## CORPORATION

power of, to make ordinances, 20.

## COURTS-MARTIAL

jurisdiction to punish for desertion, exclusively in, 78, 82.

**CUMULATIVE VOTING**

description and advantages of, 739.

**DE FACTO OFFICERS**

acts of, good as to the public, 274-6, 439, 441, 452.  
who are officers de facto, 440, 443.

**DELEGATION**

of legislative power forbidden by the constitution, 3,  
24.

**DESERTION**

jurisdiction to punish for, exclusively in courts-mar-  
tial, 78.

**DISCONTINUANCE**

candidate cannot discontinue contested election, 513,  
534, 537.

**DISFRANCHISEMENT**

may be inflicted as a punishment for crime, 69, 73,  
81.  
only incurred after trial and sentence, 69, 81.  
cannot be adjudged by election officers, 69.  
effect of, 73, 83.  
power of the states to inflict, 82.

**DISQUALIFICATION**

effect of vote for disqualified person, 129, 144, 150.  
constitutional disqualifications for office, 134.  
for acting as election officers, 274.  
by acceptance of another office, 655.

**DIVISION**

of election district, destroys the functions of local  
officers, 517.

**ELECTION**

requisites of a valid, 681.  
to fill a vacancy, 679, 684.  
of judges, 685, 692-4.

**ELECTION DISTRICTS**

electors must vote in their proper, 214, 223, 236.  
what is an election district, 238.  
effect of division of, 517, 526.



## ELECTION LAWS

- not required to be uniform, 50, 63, 176.
- forms of, must be strictly pursued, 448.
- but only such as affect the merits, 449.
- what provisions of, are directory, 529.

## ELECTION OFFICERS

- liability of, to action, 39, 52, 190, 192.
- not liable for mistake of judgment, 98, 190.
- presumptions in their favor, 98.
- nature of the action against, 194.
- damages in actions against, 195.
- when punishable by indictment, 195.
- form of indictment against, 195, 711.
- are judicial officers, 196; see 400, 402.
- misconduct of, when affecting the election, 268, 452.
- when eligible, 274, 452.
- what persons incompetent to act as, 274.
- privilege from arrest, 280.
- acts of, when ministerial, 395, 400. ✓
- election must be held by proper officers, 451.
- neglect of directory provisions by, not cause for rejecting the poll, 453.
- courts cannot try contested elections of, 455.
- appointed for state, competent to conduct presidential election, 517.
- are annual officers, 523.
- courts cannot allow extra compensation to, 590.
- may reject vote of a disqualified person, though on the registry list, 695.

## ELECTIVE FRANCHISE

- power to regulate, is exclusively in the states, 27, 49, 72.
- a conventional right, 27, 90.
- when action lies for refusal of, 34.
- not a right of property, 36, 90.
- may be taken away by the states, 38, 94.
- negro suffrage, 49, 65.
- prior to the 15th amendment, negroes did not enjoy the, 49.

## ELECTORS. See VOTERS

**ELIGIBILITY**

meaning of, 143.

**EMOLUMENTS**

of office may be recovered from a usurper, 391.

**EVIDENCE**

of intention of voters, when admissible, 258, 264, 369, 385.

returns, when evidence, 286.

election papers, 378, 409, 480.

if imperfect, may be sustained by parol, 378.

effect of, 383-4, 385.

best evidence must be produced, 384, 480.

ballots the best evidence, 480.

declarations of voters, for what purpose admissible, 385, 395, 413.

circumstantial, to prove how an elector voted, 385, 408.  
must be relevant, 414.

what may be proved in a contested election case, 414-15.

rebutting testimony, 416, 422.

**EXECUTIVE**

motives of, in making appointment, not inquirable into, 286.

**EX POST FACTO LAWS**

definition of, 37.

characteristics of, 38, 71.

what are, 86-7.

**FAILURE TO ELECT**

where two polls are opened, both illegal, 583.

**FEEES OF OFFICE**

election confers right to, 605, 611.

may be recovered from a usurper, 605, 610.

by action for money had and received, 605, 610.

when reasonable expenses will be allowed in such action, 605.

**FRAUD**

question of, not to be submitted, without evidence to sustain it, 423.

what amounts to, in election officers, 423, 432.

## FREEDOM OF ELECTION

interference with, by military power, 603-5.

## GENERAL ASSEMBLY

cannot delegate the power of legislation, 3.

nor confer the elective franchise on other classes than those described in the constitution, 47.

## ILLEGAL VOTES

effect of, on the election, 236, 249, 558.

do not affect the election, unless sufficient to change the result, 454.

if elector vote twice, second vote to be rejected, 480.

votes received without preliminary proof illegal, 492, 558.

vote of elector whose faculties are enfeebled by age, not illegal, 493.

vote of idiot, illegal, 493.

when illegal voting punishable by indictment, 695.

## INCOMPATIBLE OFFICES

what are, 143.

## INDICTMENT

for illegal voting, when sustainable, 695, 703.

evidence in, for illegal voting, 703-4.

requisites of, for illegal voting, 705, 710.

particular disqualification must be stated, 705, 710.

requisites of, against election officers, 711, 727.

different officers cannot be joined, 711.

## INFAMOUS CRIME

what is an, 134.

bribery of elector is not, 134.

## INFLUENCE

exerted on voters, effect of, 616.

when indictable, 616.

when it avoids an election, 616.

## INHABITANT

does not mean citizen, 160, 168.

## INJUNCTION

will be granted to quiet possession of office during a pending contest, 573.

not granted to restrain certifying of fraudulent returns, regular on their face, 617, 623.

when granted, in matters relating to elections, 623.

to restrain interference with organization, 632.

*Insubstantive other hands 268, 452*

## INTEREST

when it disqualifies a person from voting, 196, 212-13.

## IRREGULARITIES

do not vitiate an election, 260-1, 270-1, 320, 328, 423, 439, 448, 453, 496.

what are deemed irregularities, 448, 449, 453.

and what, matters of substance, 448.

## ISSUE

will not be granted, in contested election case, 360, 364.

## JUDGES

when elective, can be chosen in no other manner, 685, 693.

remarks on an elective judiciary, 692.

evils of the system, 692-3.

## JURISDICTION

to try contested election, when exclusive, 143, 557, 630, 656.

supervisory jurisdiction of the courts, 210, 557.  
appellate, 538.

## LEGISLATIVE POWER

cannot be delegated to the people, 3.

constitutional rights of electors above, 44.

## LIMITATION

petition not filed within time of, will be quashed, 503.

runs from day of election, 503.

held otherwise, 515-16.

## MAJORITY

how computed, 133, 299.

**MANDAMUS**

- to compel election, when granted, 624, 631.
- to restore member, ousted without notice, 646.

**MILITARY POWER**

- interference of, with freedom of election, 603-5.

**MINORITY**

- election by minority vote, when valid, 126, 130, 133.

**MORAL LAW**

- how far binding on law-makers, 5, 29, 85, 87-8, 200.

**NATURALIZATION**

- certificate of, conclusive on election officers, 98, 105.
- powers of court of nisi prius, 98, 106.
- history of elections of 1868 in Philadelphia, 103-5.
- effect of certificate of, 105-6.
- parent's, how proved, 106.
- rights of naturalized citizens, as voters, 106.

**NATURAL RIGHTS**

- what are, 88-9.
- right to pursue a particular calling, 89.
- do not include the right of suffrage, 90.

**NEXT TERM**

- jurisdiction does not fall, by omission to decide at, 527, 533, 546.

**NOTICE**

- effect of want of, on an election, 450, 679, 684.

**OATH. See AFFIDAVIT.**

- valid, though not taken on the Gospels, 437.
- neglect of officers to take, will not vitiate the election, 438.

**ORGANIZATION**

- of municipal legislative bodies, 632.
- interference with, restrained by injunction, 632.

**OUSTER**

- of member, without notice, illegal, 646.
- mandamus will lie, to restore, 646.
- otherwise, where there has been a trial on notice, 646.

**PENAL LAWS**

- to be strictly construed, 71.

## PETITION

- requisites of, to contest an election, 320, 334-6, 351, 467, 550.
- if defective, will be quashed, 320, 335, 466.
- how verified, 336.
- must be signed, 336.
- petitioners will not be allowed to withdraw, 336.
- may be amended, 337.
- affidavit, when sufficient, 538.

## PETITIONERS

- are competent witnesses, 366, 465.

## PLACE

- electors must vote at their place of residence, 214.
- an essential element in the right of suffrage, 251, 257.
- of the essence of a legal election, 450.

## PEOPLE

- the source of sovereign authority, 5.
- what laws may be submitted to a vote of the people, 18, 26.
- qualified voters constitute the, 93.

## POLLS

- may be rejected, when held at a wrong place, without necessity, 251.
- and when opened at a much later hour than prescribed by law, 251.

## PRESUMPTION

- in favor of acts of election officers, 98.
- in favor of legality of the vote of an alien born, 106, 385, 410, 413.
- rebutted by *primâ facie* evidence of want of naturalization, 385, 411.
- that ballots have not been tampered with, will overcome that of correctness of the official returns, 483.

## PRIVILEGE

- of electors from arrest, 277.
- trespass will not lie for violation of, 277.
- extent of, 280-1. 366.

**PROCESS OF LAW**

definition of, 74-5.

what is due process of law, 75.

**PROXY**

who may vote by, 282.

may be revoked, 285.

**PURGING THE POLL**

illegal votes not to be taken from majority candidate,  
unless cast for him, 236, 249, 492, 558.

**QUALIFICATIONS**

federal, only extend to race or color, 65.

proof of electors', how made, 152, 188, 189, 388, 403.

decision of inspectors, not conclusive on questions of,  
385, 404-5.

effect of receipt of vote, without proof of, 452.

of borough electors, not obligatory as to voters for  
general officers, 455.

**QUORUM**

what is a quorum, 130.

presence of, how shown, 130.

**QUO WARRANTO**

not a writ of right, 144, 664.

relator must have an interest, 146, 289, 664.

defeated candidate has no interest, 147.

must be brought during the term of the office, 274.

pleadings in, 301-2.

jurisdiction in, not ousted by special remedy to con-  
test an election, 480, 663; *contra*, 656, 663.

will lie, when there was no vacancy to be filled, 659.

who is a proper relator, 664.

**RECORDER**

power of, to administer oaths, 544.

is a judge, 689.

must be elected, 685.

**RECOUNT**

when granted, in contested election case, 360, 365.

**REGISTER**

when evidence of qualification, 64.

**REGISTRY LAWS**

- not unconstitutional, 51, 595.
- requisites of valid, 58, 61, 62.
- effect of, 64.
- practice under, 64.
- inspectors may reject vote of disqualified person, though on the registry, 695.

**REHEARING**

- power to grant, after affirmance in appellate court, 558.

**REJECTION**

- of entire polls, when allowable, 251, 493, 501-3, 681.
- interference of stranger, not cause of, 268, 452.
- for adoption of an erroneous rule of qualification, 450, 455.
- time and place of the essence of an election, 450.
- neglect of directory provisions, not cause of, 449, 453.
- in case of rejection of the poll, proof of legal votes may be made, 493.

**REMOVAL**

- of residence, effect of, on rights of elector, 50, 236.

**RESIDENCE**

- qualification of, in electors, 107, 172, 187, 189, 223, 236, 480.
- what is such, as to qualify a voter, 109, 113, 480.
- must be in the election district, 109-10, 223.
- means the same as domicil, 112, 113, 468.
- must be permanent, 113, 470, 473.
- change of, 113, 236, 470.
- how acquired, 113, 236, 410, 468, 478.
- when lost by appointment to office, outside the district, 143, 479.
- powers of election officers in reference to question of, 468, 478.
- may be acquired by persons in the military service, 480.

**RETURN JUDGES. See CANVASSERS.****RETURNS**

- evidence, in case of contest, 288.
- having been once canvassed, not open for reconsideration, 307, 313.



**RETURNS—Continued.**

- conclusive, in a collateral suit, 307, 313.
- effect of, in a direct proceeding to contest the election, 313, 435.
- when conclusive on canvassers, 423.
- not conclusive on county commissioners, in ward election, 582.

**SOLDIERS**

- cannot be empowered to vote outside the district of their residence, 214, 236.

**SPEAKER**

- right of, to vote, 300.

**SPECIFICATIONS**

- insufficient, will be stricken out, 335, 351, 359, 360, 477.
- when sufficient, 351, 359.
- when motion to strike out, must be made, 360.

**STATE COURTS**

- cannot be invested with federal jurisdiction, 76.

**STATES**

- power to regulate the elective franchise is exclusively in the, 27, 42, 49.
- may take away the elective franchise, 38.
- sovereign powers of the, 84-5, 92.

**STATUTES**

- cannot be passed by the two houses in joint convention, 22.
- construction of, 72, 77.

**SUPERSEDEAS**

- of commission, must be by new appointment, 142.

**TAXES**

- payment of, to qualify an elector, must be assessed on him individually, 114.
- need not be a poll-tax, 114, 124.
- assessment of, 116, 124.
- elector may pay one of several, as a qualification, 125.
- payment of, by a third person, 125.

**TERM OF OFFICE**

- constitutional expiration of, 665.
- of person elected to fill a vacancy, 669.

**TEST-OATHS**

- cannot be imposed on voters by the legislature, unless empowered by the constitution, 48, 97.
- may be imposed by state authority, 83, 97.
- but not as a qualification for exercising a lawful avocation, 97.

**TICKETS**

- containing two names for the same office, bad as to both, 258, 266.
- but not as to candidates for other offices, 258.
- effect of misnomer of candidates, 258, 267, 436-7.
- containing surname only, not valid, 264.
- form of, 265-6, 299.
- designation of office, 266, 438.
- containing the same name several times, good as one vote, 480.

**TIE-VOTE**

- no election, in case of, 286, 299.

**TIME**

- of opening the polls, effect of, on the election, 251, 257, 451.
- of closing, directory merely, 423, 445-7, 451.
- when it will be cause for rejecting the poll, 451.
- effect of receipt of votes, after time of closing, 451.

**TREASON**

- definition of, 39.

**TRESPASS**

- will not lie for violation of elector's privilege from arrest, 277.

**USURPER**

- liable for profits of office, 605.

**VACANCY**

- in office, by failure to elect, 286.
- not created by death of person elected, before qualifying, 670, 677.

**VACANCY**—*Continued.*

- when election to fill, may be held, 677.
- original, cannot be filled by appointment, 677-8.
- election to fill, when void for want of notice, 679.

**VOTE**

- can only be cast by a qualified elector, 392.
- ballot of disqualified person not a vote, 392.

**VOTERS**

- constitutional rights of, beyond legislative control, 44.
- proof of qualification of, 152, 403.
- when aliens legal voters, 152.
- illegal, must disclose their votes, 248, 281, 377.
- privilege of, from arrest, 277.
- trespass will not lie for violation of privilege of, 277.
- legal, cannot be compelled to disclose their vote, 281, 366, 376.
- but may waive the privilege, 366, 408.

**WAGER**

- upon the result of an election, void, 728, 735.

**WAIVER**

- of constitutional franchise, by acceptance of office, 286.

**WITNESSES**

- illegal voters must disclose their vote, 248.
- electors are competent, 366.
- and petitioners, 366, 465.













KF 4886 A4 B85

Author	Vol
Brightly, Frederick Charles	1
Title A collection of leading cases on the law of elections in the US	

Date	Borrower's Name

